No. 5020

United States

Circuit Court of Appeals

For the Ninth Circuit.

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EVERETT FRUIT PRODUCTS CO., a Corporation,

Plaintiff in Error,

vs.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, Copartners, Doing Business Under the Firm Name and Style of HOFFMAN & GREENLEE,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Messrs. WILLIAMS & DAVIS, Attorneys for Plaintiff in Error, Everett, Washington.

Messrs. REAMES & MOORE, Attorneys for Plaintiff in Error, 1107–10 Dexter Horton Building, Seattle, Washington.

Messrs. KERR, McCORD & IVEY, Attorneys for Defendants in Error, 1309–16 Hoge Building, Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9286.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, Copartners Doing Business Under the Firm Name and Style of "HOFFMAN & GREENLEE,"

Plaintiffs,

vs.

EVERETT FRUIT PRODUCTS CO., a Corporation,

Defendant.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

The plaintiffs for cause of action state:

I.

That they are now and were at all times hereinafter mentioned copartners doing business under the firm name and style of "Hoffman & Greenlee," with their office and place of business at San Francisco in the State of California, and are now and were at all times herein mentioned residents and citizens of San Francisco in the State of California.

II.

That the defendant is now and was at all times herein mentioned a corporation organized and existing under the laws of the State of Washington, with its principal place of business at Everett, Washington, within the jurisdiction of this court.

III.

On the 6th day of August, 1924, the plaintiffs herein and the defendant entered into a written contract whereby the [2] defendant agreed to sell and the plaintiff agreed to purchase two thousand (2,000) cases, equalling four thousand (4,000) dozen, size 2½ cans, of canned substandard pears at the agreed purchase price of $2.50 per dozen, less 4% brokerage, to be of the 1924 pack of pears as packed by the defendant, which is a corporation engaged in the canning and sale of fresh fruits and vegetables; the said pears were sold subject to approval of sample and were sold for delivery

F. A. S. Steamer, to be delivered when packed, upon the following terms: 2% 10 days, Net 30 days, sight-draft to accompany bill of lading, a true copy of said contract, together with the terms and conditions thereof, is hereto attached, marked Exhibit "A," and by this reference made a part hereof.

IV.

That on August 11, 1924, the parties hereto entered into another contract wherein the plaintiff agreed to purchase and the defendant agreed to sell an additional three thousand (3,000) cases, constituting six thousand (6,000) dozen, of canned substandared pears of the same kind and description as mentioned in the foregoing paragraph, the contract for the purchase of which was in the same terms and conditions and on the same form as the foregoing mentioned contract, hereto attached, marked Exhibit "A," differing therefrom only as to the date thereof, the amount of pears to be sold thereunder, which said contract had this additional condition stated on the face thereof, to wit: subject to *pro rata* delivery.

V.

That the defendant's 1924 pack of pears was ready for delivery on October 1, 1924, but the defendant failed and refused to tender to the plaintiffs or submit samples to the plaintiffs [3] of any of the cases or cans of pears of the quality and kind contracted for in the foregoing contracts, although requested and demanded so to do, to the damage of the plaintiffs herein in the sum of forty (40) cents

per dozen cans or eighty (80) cents per case, making the total damage to the plaintiffs, by reason of the said breach of the said contract by the defendant, the sum of Four Thousand ($4,000.00) Dollars, no part of which has been paid, although due and payable and demand for the payment of the same has been made.

WHEREFORE, plaintiffs pray judgment against the defendant for the sum of Four Thousand ($4,000.00) Dollars, together with their costs and disbursements herein expended, and such other and further relief as to the Court may seem proper in the premises.

KERR, McCORD & IVEY,
Attorneys for Plaintiff.

United States of America,
Western District of Washington,
Northern Division,—ss.

J. N. Ivey, being first duly sworn, on oath says: That he is one of the attorneys for the plaintiffs in the above-entitled action, and that he makes this verification for the reason that neither of the plaintiffs are now present within the jurisdiction of this court; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

J. N. IVEY.

Subscribed and sworn to before me this 10th day of February, 1925.

MILLARD P. THOMAS,
Notary Public in and for the State of Washington,
Residing at Seattle. [4]

EXHIBIT "A."

Everett Fruit Products Co. No. 2798
Everett, Washington.

Contract Form
No. 260

SELLS TO

Hoffman Greenlee, Buyer
Of San Francisco, Cal.
Goods specified as per contract on reverse side
Walter C. Zinn Co., Broker, San Francisco, Cal.
Address ————.

Aug. 6, 1924.
Consign to ————.
Distination ————.
Routing ————.
Time of Shipment when packed ———
Sign on Reverse Side.

Cases	Dozens	Size	Grade	Variety	Brand	Price per doz.	Do not use these columns
2000	4000	#2½	Sub. Std.	Pears		$2.50	

Less 4% Brokerage
1924 pack
subject approval sample
Price F. A. S. Steamer, Everett, Wash.
TERMS: 2% 10 days N/30
S/D–B/L
If for export, ½ of 1% swell allowance.
If buyers labels, usual label allowance.
Wood cases.

Buyer's Copy. [5]

FRUIT AND/OR VEGETABLE CONTRACT.
As Per Specifications on Reverse Side.
TERMS OF PAYMENT. Cash less 2%, pay-

able in New York or Seattle exchange when paid within ten days or on receipt of invoice with documents.

MARINE INSURANCE. On all shipments by water to Atlantic Coast or Gulf ports seller to insure for buyer's account and expense to cover buyer's cost with 10% added. English form of contract with 3% particular average on each mark.

CONDITIONS. The prices specified are for goods "Free on Board" at factory. The seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

If seller should be unable to perform all its obligations under this contract by reason of a strike, fire or other circumstances beyond its control, such obligation shall at once terminate and cease.

In case of short pack by reason of which seller is unable to make full delivery of any of the grades specified, it is mutually agreed that deliveries are to be prorated.

Goods to be shipped at seller's discretion as soon as practicable after packing unless otherwise specified.

FRUITS remaining unshipped on December 31st following the date of this contract shall be billed and paid for on that date.

Buyer agrees to pay said invoices on demand or protect draft for invoice value, on presentation, with warehouse receipt attached, and seller agrees to store said goods and insure them in selected insurance companies for buyer's account against loss

or damage by fire for 75 per cent of invoice cost. Buyer to pay one and one-quarter cents per case per month to cover cost of both storage and insurance; fractional months at full rate; charges to accrue from the date of warehouse receipt. Seller reserved the right to move and store said goods at buyer's expense in public warehouses if goods are not ordered out by buyer prior to March 1st following date of billing as above.

SWELLS. Guaranteed to July 1st following packing season. Can markings must be furnished with each report of swelled goods. Seller reserves the right of ordering damaged goods returned, but in case seller directs goods destroyed, swell claim will be paid only upon written statement from food inspector that goods have been destroyed.

GUARANTEE. Seller guarantees goods covered by this contract to conform with the requirements of the National Food and Drugs Act of June 30th, 1906, except seller is relieved from any responsibility for misbranding when goods are not shipped under its labels.

This contract to be binding upon the seller must be confirmed in writing by the seller, who, however, shall not be responsible for the performance thereof, unless a copy properly signed by the buyer is delivered to the seller within 20 days of the date thereof.

ARBITRATION. Any dispute arising as to the proper fulfillment of this contract, to be settled by arbitration, by the regular canned goods and dried fruit arbitration boards, either in the cities of New

York, Chicago, San Francisco, or Portland, unless otherwise mutually agreed upon. If question is as to quality, actual samples to be drawn and submitted to such board as selected, their decision to be binding upon both parties to this contract. Party against whom decision is rendered, shall pay arbitration fees and expenses incurred. If decision is rendered that seller has complied with contract, invoice if unpaid shall become due and payable at once. If decision is rendered against seller, arbitrators shall determine amount of allowance, which amount shall be payable at once. If the arbitrators decide the seller has not shown good faith in making delivery hereunder, the buyer shall be entitled to another tender in full compliance of this contract. No unimportant variation in the execution of this contract shall constitute basis for claim.

Buyer HOFFMAN & GREENLEE.
C. C. BOOBAR.
EVERETT FRUIT PRODUCTS CO.,
Seller.

By F. B. WRIGHT.

Broker ————.

[Endorsed]: Filed Feb. 11, 1925. [6]

UNITED STATES OF AMERICA.

[Title of Court and Cause.]

SUMMONS.

The President of the United States of America, GREETING:

To the Above-named Defendant: Everett Fruit Products Co., a Corporation,

YOU ARE HEREBY REQUIRED to appear in the United States District Court, in and for the Western District of Washington, Northern Division, within twenty days after the day of service of this summons upon you, exclusive of the day of service, and answer the complaint of the above-named plaintiffs, now on file in the office of the Clerk of said court, in the city of Seattle, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in said complaint.

WITNESS, the Hon. JEREMIAH NETERER, Judge of said court, this 11th day of February, in the year of our Lord one thousand nine hundred and twenty-five, and of our Independence the one hundred and forty-ninth.

[Seal]

ED. M. LAKIN,
Clerk.

By T. W. Egger,
Deputy Clerk.

KERR, McCORD & IVEY,
Attorneys for Plaintiff.

MARSHAL'S RETURN.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the within summons on the therein named Everett Fruit Produce Co. by handing to and leaving a true and correct copy thereof with Mr. Rebbeack personally at Everett in said District on the 13 day of February, A. D. 1925.

E. B. BENN,
U. S. Marshal.
By John Rock,
Deputy.

[Endorsed]: Filed Feb. 14, 1925. [7]

[Title of Court and Cause.]

ANSWER.

Comes now the above-named defendant and in answer to the complaint of the plaintiffs herein, admits, denies and alleges as follows:

I.

Answering Paragraph V of said complaint, the defendant denies that the defendant failed or refused to deliver to the plaintiffs or submit samples to the plaintiffs of any of the cases or cans of pears of the quality and kind contracted for in the contracts referred to in said complaint, and denies that the plaintiffs were damaged in the sum of Forty

Cents (40¢) per dozen cans and denies that the plaintiffs were damaged in the sum of Eighty Cents (80¢) per case, and denies that the plaintiffs were damaged in any sum per dozen cans or per case, and denies that the plaintiffs were damaged in the sum of Four Thousand Dollars ($4,000.00), and denies that the plaintiffs were damaged in any sum, and denies that any sum is due the plaintiffs by the defendant under said contracts.

FOR A FIRST AFFIRMATIVE DEFENSE to the alleged cause of action set forth in the complaint herein, defendant alleges as follows: [8]

I.

That it is and was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Everett, Snohomish County, Washington; that it is and was at all times herein mentioned engaged in the business of canning and selling fruits and vegetables; that such fruits and vegetables are canned at the plant of the defendant in Everett, Washington; that its products are sold throughout the United States and portions of its products are exported.

II.

That during the season and year of 1924 the said defendant, at its plant in Everett, Washington, canned, among other things, pears of the grade called and designated as "Sub-Standard pears"; that such grade of substandard pears as packed by said defendant was the grade of pears covered by

the agreements set forth and referred to in the complaint herein; that after said grade of pears was so packed by said defendant the said defendant delivered to said plaintiffs samples of such grade of pears and that the said plaintiffs had such grade of pears so packed by said defendant inspected at the plant of the defendant in Everett, Washington; that the said plaintiffs failed and refused to approve such samples and rejected such samples, and the said plaintiffs failed and refused to approve such canned pears as packed by said defendant after such inspection, and failed and refused to accept such pears and the said plaintiffs failed and refused to order from the defendant the delivery of such pears.

WHEREFORE, defendant prays that the complaint of the plaintiffs be dismissed, and that the defendant have and recover from the plaintiffs its costs and disbursements herein to be taxed.

WILLIAMS & DAVIS,
MOORE & HARROUN,
Attorneys for Defendant. [9]

United States of America,
Western District of Washington,
Northern Division,—ss.

A. G. Ribbeck, being first duly sworn, on oath, deposes and says: That he is president of the above-named defendant; that he makes this verification for and on behalf of said defendant; that he has read the above and foregoing answer, knows the contents thereof, and believe the same to be true.

A. G. RIBBECK.

Subscribed and sworn to before me this 10 day of March, 1925.

[Seal] C. M. WILLIAMS,
Notary Public in and for the State of Washington,
Residing at Everett.

Due service of the foregoing answer and receipt of a copy admitted this 10th day of March, 1925.

KERR, McCORD & IVEY,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 11, 1925. [10]

[Title of Court and Cause.]

REPLY.

Comes now the above-named plaintiffs and for reply to the answer of the defendant in the above-entitled cause, state as follows:

I.

They deny each and every allegation in paragraph II of the first affirmative defense as set out in said answer.

WHEREFORE, having fully replied to the answer of the defendant, these plaintiffs pray that they have and recover judgment in accordance with the prayer of their complaint in this action.

KERR, McCORD & IVEY,
Attorneys for Plaintiffs. [10A]

State of Washington,
County of King,—ss.

J. A. Adams, being first duly sworn, on oath says: That he is one of the attorneys for the plaintiffs

in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true; that he makes this verification for the reason that neither of the plaintiffs are in the State of Washington.

J. A. ADAMS.

Subscribed and sworn to before me this 16th day of March, 1925.

[Seal] S. H. KERR,

Notary Public in and for the State of Washington, Residing at Seattle.

Copy of the within reply and service thereof acknowledged this 16 day of March, 1925.

MOORE & HARROUN,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 17, 1925. [10B]

[Title of Court and Cause.]

TRIAL.

Now on this 3d day of March, 1926, the above defendant comes into open court for trial accompanied by his attorney Ben L. Moore and with Mr. Davis of Williams & Davis present of Everett. Both sides being ready a jury is impanelled and sworn as follows: Robert McCormack, C. E. Ridgeway, W. F. Pierce, H. G. York, John Hedberg, Roy E. Turner, G. A. Ross, Thomas Pattiason, Bertram L. McMullen, Arthur O. Olsen, Frank A. Small, Clyde L. Morris. Depositions of W. C.

Zinn, Oscar Hoffman, Roy L. Pratt, Harry Todd, and W. F. Beesemyer are read to the jury. The Beesmyer deposition is stricken on motion of defendant. Exhibit "C" attached to the depositions Zinn et al. is offered in evidence, and denied. Plaintiff's exhibits numbered 1 and 2 are introduced in evidence. Plaintiff rests. Defendant moves for a nonsuit on the grounds of insufficient evidence. Said motion is denied with exception. Defendant's witnesses Andrew G. Ribbeck and F. B. Wright are sworn and examined. Plaintiff's Exhibit No. 3 is introduced and denied as evidence. Defendant's Exhibit Lettered "A–1" is admitted in evidence. Recess is had until 2 P. M. at which time the trial is resumed pursuant to adjournment with witness Wright on the stand. The cross-examination by the defendant of the witness in the deposition of W. B. Longwell taken on behalf of plaintiff is read to the jury. Defendant's witnesses J. C. Butler and Charles Allen are examined and sworn. Defendant rests. Plaintiff now reads to the jury the deposition of W. B. Longwell on direct examination in rebuttal. Witness in rebuttal F. H. Baxter is sworn and examined. Depositions of John L. Jacobs and R. G. Weston [11] are read to the jury. Plaintiff rests on rebuttal. Witness in surrebuttal F. B. Wright is recalled. Both sides rest. Defendant moves for a directed verdict in favor of defendant. After defendant's argument of the motion, the plaintiff moves for a directed verdict in favor of the plaintiff except as to the amount of damages

which it asks be submitted to the jury. After argument the Court denies the defendant's motion and grants the plaintiff's motion for a directed verdict and submits the case to the jury on the question of damages. Cause is argued to the jury. Jury is instructed by the Court. Exceptions are taken by the defendant. Jury retires for deliberation.

Jury later returns into court and all being present, a verdict is returned and reads as follows: "We, the jury do find in favor of the plaintiffs against the defendant in the sum of $2,000.00 dollars. C. L. Morris, Foreman." Verdict is ordered filed and judgment ordered accordingly.

Whereupon court stands adjourned.

Journal No. 14 at page 369. [12]

[Title of Court and Cause.]

VERDICT.

We, the jury, do find in favor of the plaintiffs against the defendant in the sum of $2,000.

C. L. MORRIS,
Foreman.

[Endorsed]: Filed Mar. 3, 1926. [13]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 9286.

OSCAR HOFFMAN, ELWOOD C. BOOBAR and FRED S. GREENLEE, Copartners, Doing Business Under the Firm Name and Style of "HOFFMAN & GREENLEE,"

Plaintiffs,

vs.

EVERETT FRUIT PRODUCTS CO., a Corporation,

Defendant.

JUDGMENT.

This cause coming on regularly for trial in the above-entitled court on the 3 day of March, 1926, jury having been impanelled, evidence introduced by each party, the defendant having moved for directed verdict, the plaintiff having joined in the said motion reserving the question of damage for the jury, the Court having heard argument of counsel, having decided in favor of the plaintiff and submitted to the jury the question of damages, jury having returned a verdict in favor of the plaintiff in the sum of $2,000.00, Court being advised in the premises, it is now.

ORDERED that the plaintiffs, Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copart-

ners, doing business under the firm name and style of "Hoffman & Greenlee," do have and recover judgment against the defendant, Everett Fruit Products Co., in the sum of Two Thousand ($2,000.00) Dollars together with interest at the rate of six per cent per annum from March 3, 1926, and that the plaintiff be granted judgment for costs against the defendant in the sum of $114.50.

Done in open court this 13th day of April, 1926.

EDWARD E. CUSHMAN,
Judge.

Approved as to form.

REAMS & MOORE,
Attys. for Deft.

O. K.—KERR, McCORD & IVEY,
For Ptffs.

[Endorsed]: Apr. 13, 1926. [14]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Comes now the above-named defendant, Everett Fruit Products Co., a corporation, by Williams & Davis and Reames & Moore, its attorneys, and moves the Court for an order setting aside the verdict, and the decision and the judgment of the Court heretofore returned, made and entered herein, and granting to the said defendant a new trial of the above-entitled action for the reasons and causes materially affecting the substantial rights of the said defendant, as follows:

1. Insufficiency of the evidence to justify the verdict.

2. Insufficiency of the evidence to justify the decision of the Court finding for the plaintiffs herein.

3. Errors in law occurring at the trial. [15]

INSUFFICIENCY OF THE EVIDENCE.

The particulars wherein the defendant claims that the evidence is insufficient to justify the verdict and the decision of the Court are as follows:

a. The contracts upon which the action herein was based showed upon the fact thereof that the defendants agreed to sell, and the plaintiffs agreed to buy certain substandard pears, subject to approval of sample by the plaintiffs. The evidence showed that samples were furnished by the defendant to the plaintiff at San Francisco, and that some examination was made by the plaintiffs or their assignee at Everett, and further was tendered or offered by the defendant to Mr. Longwell, representative at Everett, but that the plaintiffs did not approve any samples, but, on the contrary, rejected the samples and did not order any pears from the defendant.

b. There was evidence to show that the contracts involved in this action had been assigned to the California Packing Corporation, which is not a party to this action, and that said contracts, under said assignment, were at the time of the trial owned by said California Packing Corporation.

c. There was insufficient evidence to show that the plaintiffs were the owners of the contracts involved in this action, and were entitled to sue thereon.

d. There was no evidence to show the price for which the plaintiffs assigned the contracts in this action to the California Packing Corporation, or the price for which the [16] plaintiffs agreed to sell the pears described in said contracts to said California Packing Corporation, or that the plaintiffs had assigned said contracts, or agreed to sell said pears to said California Packing Corporation for any profit whatsoever. There was insufficient evidence to show that the plaintiffs incurred any liability whatsoever in any sum to the said California Packing Corporation by reason of the failure or omission of the plaintiffs to sell or deliver any pears to said California Packing Corporation, or by the failure or omission of the defendant to deliver any pears to the plaintiffs.

e. The evidence showed that Mr. Longwell, acting for the plaintiff and representing either the plaintiffs or the said California Packing Corporation, or both of them, refused to inspect the defendant's pack of substandard pears in about October, 1924, but that inspection thereof was offered be the defendant at Everett, Washington.

ERRORS IN LAW.

The particular errors in law occurring at the trial, relied upon by the defendant herein, are as follows:

a. The Court erred in denying defendant's motion to strike the following answer of the witness Oscar Hoffman to the following interrogatory:

> "If you examined the said pears, state what the examination disclosed as to the grade and quality of said pears."
>
> A. "We cut some of these samples, which disclosed that the goods were so palpably not up to grade that we felt it useless to cut further. These products were soft and mushy and full of holes and unfit for the grade." [17]

The defendant's said motion was upon the ground that the answer was not responsive and did not state facts, but merely a conclusion of the witness.

b. The Court erred in admitting in evidence, over defendant's objection and exception, the testimony of the witness Longwell for the plaintiffs in rebuttal concerning market price, the objection of the defendant being upon the ground that said testimony was a part of the plaintiffs' case in chief, and not proper rebuttal.

c. The Court erred in admitting in evidence, over the objection and exception of the defendant, the testimony of the witness Frey, who testified for the plaintiffs in rebuttal concerning an examination of samples of pears and condition thereof, and concerning market price, the objection of the defendant being upon the ground that said testimony was properly a part of plaintiff's case in chief, and not proper rebuttal.

d. The Court erred in admitting in evidence, over defendant's objection and exception, the testimony on cross-examination of the witness Wright, concerning a shipment of pears to Powell Brothers of London, the objection of the defendant being upon the ground that the said testimony is *irrelative,* immaterial and not proper cross-examination.

e. The Court erred in admitting in evidence, over the objection and exception of the defendant, the testimony of the witness Weston concerning a shipment of pears to Powell Brothers of London, and the examination of said pears, and the condition thereof in London and in Liverpool, the defendant's objection being upon the ground that said testimony referred to a London shipment and to a matter of compromise, and to a controversy [18] based on examination and inspection in London or Liverpool.

f. The Court erred in denying the defendant's motion for a compulsory nonsuit and its challenge to the sufficiency of the evidence at the conclusion of the plaintiff's case in chief.

g. The Court erred in denying the defendant's motion at the conclusion of the evidence for the direction of a verdict for the defendant.

h. The Court erred in granting the plaintiffs' motion for a directed verdict for the plaintiff.

i. The Court erred in withdrawing the case from the jury, except as to the question of market price, and in reciting the issues in the action. The motion of the defendant was upon specific grounds stated to the Court. The motion of the plaintiffs

was a conditional or qualified motion, inasmuch as the plaintiffs moved for the withdrawal of a part only of the issues from the jury, to wit: all issues except the question of market price; that there was in effect, therefore, no joinder or stipulation for withdrawing the issues from the jury on the part of both plaintiff and defendants.

j. The Court erred in its decision and finding that the agreements involved in this action were binding contracts and not unilateral agreements without consideration or mere option.

k. The Court erred in its decision and finding in effect that the agreements involved in this action were binding contracts, and that thereunder the plaintiffs, so long as they acted in good faith and not from any dishonest purpose, could reject the samples if the samples were not to the plaintiffs' [19] taste or satisfaction.

l. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 1, which reads as follows:

"DEFENDANT'S REQUESTED INSTRUCTION No. 1.

You are instructed if you find from the evidence that the pears purchased from the defendant by the plaintiffs were purchased for the purpose of resale and that the defendant knew that said pears were purchased for the purpose of resale and that said pears were resold by said plaintiffs to the California Packing Company, then you are instructed that the measure of damages in this case is the dif-

ference between the contract price and the price of such resale, and there being no evidence in this case of the resale price, you shall find for the defendant."

m. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 2, which reads as follows:

"DEFENDANT'S REQUESTED INSTRUCTION No. 2.

You are instructed that under the contract made between the plaintiffs and the defendant for the sale of pears the plaintiff agreed to purchase from the defendant substandard pears of defendant's 1924 pack "subject to the approval of plaintiffs, and if you find from the evidence in this case that the said defendant submitted to the plaintiffs fair samples of its 1924 pack of substandard pears as packed by said defendant and that said plaintiffs failed [20] and refused to approve said samples, then there was no sale and you shall find for the defendant."

n. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 3, which reads as follows:

"DEFENDANT'S REQUESTED INSTRUCTION No. 3.

You are instructed that under the contract between the said plaintiffs and defendant for the sale of pears as alleged in the complaint herein it is provided that such sale is "subject to approval of sample" and if you find from the evidence in this

case that the defendant submitted to the plaintiffs sample cans of pears and that such samples submitted were of the grade known as "substandard pears" and that the plaintiffs failed and refused to approve such samples so submitted, then there was no sale and you shall find for the defendant."

o. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 4, which reads as follows:

"DEFENDANT'S REQUESTED INSTRUCTION No. 4.

You are instructed that under the contract between the plaintiffs and the defendant the plaintiffs purchased from the defendant pears "subject to approval of sample" and it was the duty of defendant under such contract to submit to the plaintiffs samples of substandard pears of its 1924 pack and the obligation was upon the plaintiffs to approve or reject such samples, and if you find [21] "in this case from the evidence that such contracts as set forth in the complaint herein were assigned to the California Packing Company or that the pears covered by said contract were resold to the California Packing Company and that the plaintiffs delegated to a representative of the California Packing Company the duty to inspect said pears and to reject or approve such pears, then you shall find for the defendant for the reason that said plaintiffs under said contract had no right to delegate the authority to any other person or persons."

p. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 5, which reads as follows:

"DEFENDANT'S REQUESTED INSTRUCTION No. 5.

You are instructed that if you find from the evidence that the defendant submitted to the plaintiffs samples of canned pears which samples could be properly graded according to the grades known and established among the trade in the Pacific Northwest as substandard pears, and that said plaintiffs rejected or refused to approve such samples, then you shall find for the defendant and it makes no difference for the purposes of this instruction whether such substandard pears were good, bad or indifferent so long as they were substandard pears."

q. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 6, which reads as follows: [22]

"DEFENDANT'S REQUESTED INSTRUCTION No. 6.

You are instructed, if you find from the evidence that the plaintiff had made a subsale to the California Packers Corporation, or any other person, of the pears described in the contract in this case between the plaintiff and the defendant, and if you further find that the defendant failed to furnish to the plaintiff samples of substandard pears described in said contract, and if you further find that the plaintiff is entitled to recover damages from the defendant for such failure, then in ascertaining

such damages, you are hereby instructed that if you find that such subsale was made, as hereinabove mentioned, then the plaintiff would not be entitled to recover any more than nominal damages."

r. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 7, which reads as follows:

"DEFENDANT'S REQUESTED INSTRUCTION No. 7.

You are instructed that if you find from the evidence that the contracts between the plaintiff and the defendant have been assigned to the California Packers Corporation or to any person other than the plaintiff, then you shall find for the defendant."

s. The Court erred in refusing to give to the jury the defendant's written, requested instruction No. 8, which reads as follows:

'DEFENDANT'S REQUESTED INSTRUCTION No. 8.

You are requested to find for the defendant."

t. The Court erred in instructing the jury to the effect that the only question for the jury's determination was a question of damage.

u. The Court erred in instructing the jury that there was no date fixed for the delivery of the goods described in the contract. [23]

v. The Court erred in instructing the jury in substance and effect that the measure of damages was the difference between the contract price and the market price.

w. The Court erred in instructing the jury to the effect that the time for determining the market price could be taken at a time subsequent to September 12, 1924.

s. The Court erred in instructing the jury that there was no difference, or no substantial difference, in the market price of the goods at different points or localities.

y. The Court erred in instructing the jury to the effect that Mr. Ribbeck's testimony that the market price was about $2.50 meant that it was $2.50, or more than that.

WILLIAMS & DAVIS,
REAMES & MOORE,
Attorneys for Defendant.

Copy of the attached motion for new trial received and due service thereof admitted this 26th day of March, 1926.

KERR, McCORD & IVEY,
M. S.
Attorneys for Plaintiffs.

Endorsed (on cover): Order within cover.

[Endorsed]: Filed Mar. 26, 1926.

BOURQUIN, J.

Motion denied. All points made were advanced and determined at the trial.

Aug. 12, 1926.

BOURQUIN, J.

[Endorsed]: Filed Nov. 2, 1926. [24]

[Title of Court and Cause.]

PETITION FOR WRIT OF ERROR.

Comes now the above-named defendant, Everett Fruit Products Co., a corporation, by its attorneys, and respectfully shows to the court that heretofore, on the 3d day of March, 1928, the Court directed a verdict against your petitioner and in favor of plaintiff, leaving and submitting to the jury the determination by its verdict of the amount of damages to be recovered by plaintiff, and thereupon the jury which had theretofore been duly impaneled, found a verdict against your petitioner and in favor of the plaintiff in the sum of $2,000.00, and upon said verdict a final judgment was entered on the 12th day of April, 1926, against your petitioner, which said judgment became effective on the 2d day of November, 1926, upon the entry of the order of the Court denying your petitioner's motion for a new trial which theretofore, in due time, had been duly interposed by your petitioner and considered by the Court. [25]

That in said judgment and in the proceedings had prior and subsequent thereunto in this cause, certain manifest errors were permitted to the prejudice of this defendant, all of which more in detail appear and are specifically set forth in the defendant's assignment of errors, which is filed and submitted with this petition.

Your petitioner, feeling itself aggrieved by the said verdict and judgment entered thereon as afore-

said, herewith petitions this Court for writ of error and for an order permitting it to prosecute said writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the laws of the United States and under the rules of said court in such cases made and provided.

WHEREFORE, premises considered, your petitioner prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and the papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

WILLIAMS & DAVIS,
REAMES & MOORE,
Attorneys for Petitioner in Error.

(Filed Nov. 10, 1926.) [26]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Comes now the above-named defendant, Everett Fruit Products Co., a corporation, in the above numbered and entitled cause, and in connection with

its petition for a writ of error filed herein this day, assigns the following errors which the said Everett Fruit Products Co., a corporation, plaintiff in error, avers occurred on the trial thereof and upon which it relies to reverse the judgment entered herein as appears of record:

I.

The Court erred in denying the defendant's motion to strike the evidence of Oscar Hoffman, a witness on behalf of the plaintiff given by deposition, which evidence and the motion to strike the same in substance as follows:

The witness testified:

> "To the best of my recollection it was impossible to purchase 'seconds' or 'sub-standard' pears on either September 12, 1924, or October 18, 1924, in lots such as represented by the contract's Exhibits 'A' and 'A–1.' Small parcels were available at $2.85 to $2.90 per dozen at both times, with a [27] gradual hardening market as the year progressed. By a 'hardening market' I mean increased value and increased difficulty in securing supplies.
>
> Mr. MOORE.—(Attorney for defendant):
>
> "Pardon me just a moment. We move to strike the testimony of this witness as to the market price of small lots on the ground that the witness has already testified that there was no market and no market price therefore on lots of this size."

The COURT.—"Well I think his evidence is competent as to small lots furnishing some basis on which the jury might arrive at the value of large lots. The motion will be denied."

Defendant's exception noted.

II.

The Court erred in the admission of the following evidence offered by the plaintiff on cross-examination of the witness F. B. Wright, a witness for the defendant, which said evidence on cross-examination was objected to by the defendant on the ground that it was irrelvant, immaterial and not proper cross-examination. On cross-examination the said witness testified in substance over the objection of the defendant that the defendant corporation shipped a lot of fruit to London in 1924 and that the defendant had a contract in the fall of 1924 for delivery of substandard pears of the 1924 pack to California Canners Corporation of California.

III.

The Court erred in the admission of the testimony of W. B. Longwell, a witness on behalf of plaintiff, which said testimony [28] was immaterial and was to the following effect:

After I inspected the pears I had a conversation on the loading platform with Mr. Wright. The conversation between Mr. Wright and myself at the place I designated had to do with the quality of pears being packed. I protested to Mr. Wright as to the quality of the pack that they were putting up and told him that it was

not a second pear, but was nothing better than a pie pear.

IV.

The Court erred in the admission of the testimony of W. B. Longwell, a witness on behalf of the plaintiffs, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was not proper rebuttal testimony and was in effect as follows:

"I am familiar with the market price of this grade of pears in the State of Washington and along the Pacific Coast between the 1st of September and the 8th of October, 1924. The going market price for No. 2½ substandard pears sold at Everett, Washington for fall delivery in the 1924 pack on or about October 1, 1924, was $2.85 factory or about $2.90 steamer. After October the price remained about at $2.85 to $2.90 level. It was about in September, in the packing season of 1924 that the price reached $2.85 or $2.90, that is, the early part of September somewhere around the first to the 5th of September."

V.

The Court erred in the admission of the testimony of Robert D. Frey, a witness on behalf of the plaintiffs, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief, which said testimony was not proper rebuttal testimony and was in effect as follows: [29]

"I have been engaged for the last eleven years in buying and selling pears and keeping posted on the market and am qualified in determining grades. At the request of the officers of California Canners I made an examination of four samples of No. 2½ cans substandard pears offered by W. C. Zinn to the California Canners. One can cut was evidently not packed as substandard at all but contained a syrup two grades higher and evidently a mistake. The balance were not suitable for the grade, with the exception of one can which was, I should say, just about passable. Taken as a whole, the samples examined were not substandard pears as said term is understood in the trade on the Pacific Coast. My recollection is that the market price for substandard pears on or about September 12, 1924, was in the neighborhood of $2.80 to $2.85 F. A. S. steamer Everett, Washington. Between September 12, 1924, and October 18, 1924, the market had advanced probably five to ten cents a dozen. The highest and lowest market value of the said pears between the said dates was $2.80 and $2.95.

VI.

The Court erred in the admission of the testimony of R. G. Weston given by deposition and offered on behalf of plaintiff, upon the ground that said testimony referred to a London shipment and to a matter of compromise and a controversy based on examination and inspection in London or Liverpool, which said testimony was to the following effect:

I am associated with Powell Bros. & Company of London in the business of canned goods. In the fall of 1924, Powell Bros. & Company purchased 5000 cases second standards—2½ second standards, pears, from Dodwell & Company, who acted through Meinrath, Corbaley & Co. from Everett Fruit Products Co. Under that contract deliveries of canned pears were made at London. I examined some of the contents of that shipment for quality. The size of the fruit varied enormously. In several tins we found one or more pears which were so soft that they were in a state of mush. Furthermore, a large number of pears had pieces cut out of them to remove a damaged portion and even some pears had a hole drilled right through them to remove such damaged portion. 1,500 cases were shipped [30] from the Pacific Coast by the steamship "Urania," of which 1,000 cases were landed in London and 500 cases were trans-shipped from London to Liverpool. The remaining 296 cases were shipped from the Pacific Coast by the steamship "London Shipper." The examination of the samples drawn at London, that I made, was in my usual course of business there.

VII.

The Court erred in the admission of the testimony of John L. Jacobs, a witness on behalf of the plaintiff, which was offered and admitted in rebuttal after the plaintiffs had rested their case in chief and after the defendant had rested its case in chief,

which said testimony was not proper rebuttal testimony, and was in effect, as follows:

After giving testimony tending to show his qualifications and knowledge, the witness testified in substance: I was present at the examination of samples, represented to be "Substandard" pears, packed by the Everett Fruit Products Company, submitted by Walter C. Zinn to our company. This examination was held in the office of M. Feibush, in San Francisco, in the presence of Robert Frey of the California Canneries Company, Mr. Feibush and myself. These samples were examined on two dates, on September 15th and September 25, 1924. The samples submitted, in our opinion, were not up to the grade of "Substandard" pears. Most of the samples submitted contained a very large percentage of mushy, soft, broken fruit, which is absolutely unfit to be put into grade of "Substandard" and belongs in the "Pie" grade. Also a considerable number of halves in the samples submitted showed holes right through the center of the pears, making those particular halves unfit for the grade of "Water" pears. The effect of the presence of such fruit in the samples submitted would render the sample unfit for the grade of "Substandard" pears and unacceptable as such.

It is my recollection that the market value of "Substandard" pears about the middle of September, 1924, had advanced very considerably from the market of the prior months of

that year, and was somewhere in the neighborhood of $2.85 per dozen, F. A. S. steamer, at the Northwest, including Everett, Washington. The market value was thoroughly sustained between the dates of September 12, 1924, and October 18, 1924, and, if anything, was rising slightly. It is my recollection that the market value of No. 2½ "substandard" pears, in the Northwest, including Everett, Washington, F. A. S. steamer, between September 12, 1924, and October 18, 1924, was between $2.85 and $2.90 per dozen. [31]

VIII.

The Court erred in denying the motion of the defendant, which was interposed at the conclusion of the plaintiffs' testimony in support of their case in chief, by which said motion the defendant challenged the sufficiency of the evidence produced on behalf of plaintiffs to sustain any verdict or judgment and moved the court for its order granting a nonsuit of the plaintiffs' case, for the reasons:

a. That plaintiffs' testimony failed to show that plaintiffs were the real parties in interest.

b. That the agreements involved in the case were executory agreements without present consideration, of an optional character, and lacking in mutuality, and of no legal force and effect.

c. That the plaintiffs' testimony failed to show that any pears were ever ordered by the plaintiffs pursuant to the contract.

d. That plaintiffs' testimony tended to show a

resale of the pears to another corporation, and did not show any loss or damage to the plaintiffs.

IX.

The Court erred in denying the motion of the defendant for a directed verdict for the defendant, which said motion was interposed at the conclusion of all of the testimony in the case, and was upon the following grounds, to wit:

a. That it appeared from the plaintiffs' testimony that the contract sued upon had been assigned to the California Canneries Association, which was and is the owner of the contract, and that the plaintiff in this cause is not the real party in interest herein.

b. That if the plaintiffs are entitled to recover, the measure of their damages would be the difference between the contract price [32] and the subsale price and would be limited to that, and that there is no evidence of any damage whatsoever suffered by plaintiffs.

c. That the contract sued upon was not supported by any present consideration that it was an unilateral agreement and of no legal binding effect.

X.

The Court erred in granting the motion of the plaintiffs for a directed verdict and withdrawing from the consideration of the jury all questions save that of the amount of damages, for the following reasons:

a. The motion of the plaintiffs was a qualified and conditional motion, which asked for the determination of the jury on the question of damages.

b. That the defendant had submitted and requested the Court to give special instructions on its behalf.

c. There was a disputed issue of fact as to whether the samples furnished conformed to the specifications of the agreements and as to whether the defendant had breached any covenant of the agreement.

XI.

The Court erred in granting the motion of the plaintiff for a directed verdict and in ruling and deciding that plaintiffs were entitled to recover, and directing the jury to return a verdict for the plaintiffs, for the reasons:

a. That the plaintiffs were not the real parties in interest inasmuch as their testimony affirmatively showed that the agreements of purchase of pears had been assigned.

b. The agreements involved in the case were executory agreements [33] without present consideration, of an optional character, and lacking in mutuality and of no legal binding force or effect.

c. The evidence showed that the plaintiffs had never approved any samples and had never ordered any pears, and that there was no breach of the agreements by the defendant.

d. The evidence showed that the defendant had performed whatever covenants of the agreements, if any, it was obliged to perform.

e. The Court reached its decision without considering or determining the fact whether the sam-

ples of pears conformed to the specifications of the agreements.

f. That the testimony failed to show any damage suffered by the plaintiffs, and, therefore, failed to show any right of recovery by the plaintiffs.

XII.

That the Court erred in refusing to give to the jury the defendant's requested instruction No. 1, as follows:

> "You are instructed if you find from the evidence that the pears purchased from the defendant by the plaintiffs were purchased for the purpose of resale and that the defendant knew that said pears were purchased for the purpose of resale and that said pears were resold by said plaintiffs to the California Packing Company, then you are instructed that the measure of damages in this case is the difference between the contract price and the price of such resale, and there being no evidence in this case of the resale price, you shall find for the defendant."

XIII.

That the Court erred in refusing to give to the jury the defendant's requested instruction No. 2, as follows:

> "You are instructed that under the contract made between the plaintiffs and the defendant for the sale of pears the plaintiffs agreed to purchase from the defendant substandard pears of defendant's 1924 pack 'subject to the approval of plaintiffs,' and if you find from

the evidence in this case that the said defendant submitted to the plaintiffs fair samples of its 1924 pack of substandard pears as packed by said defendant and that said plaintiffs failed and refused to approve said samples, then there was no sale and you shall find for the defendant." [34]

XIV.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 3, as follows:

"You are instructed that under the contract between the said plaintiffs and defendant for the sale of pears as alleged in the complaint herein it is provided that such sale is 'subject to approval of sample' and if you find from the evidence in this case that the defendant submitted to the plaintiffs sample cans of pears and that such samples submitted were of the grade known as 'sub-standard pears' and that the plaintiffs failed and refused to approve such samples so submitted, then there was no sale and you shall find for the defendant."

XV.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 4, as follows:

"You are instructed that under the contract between the plaintiffs and the defendant the plaintiffs purchased from the defendant pears 'subject to approval of sample' and it was the duty of defendant under such con-

tract to submit to the plaintiffs samples of substandard pears of its 1924 pack and the obligation was upon the plaintiffs to approve or reject such samples, and if you find in this case from the evidence that such contracts as set forth in the complaint herein were assigned to the California Packing Company or that the pears covered by said contract were resold to the California Packing Company and that the plaintiffs delegated to a representative of the California Packing Company the duty to inspect said pears and to reject or approve such pears, then you shall find for the defendant for the reason that said plaintiffs under said contract had no right to delegate the authority to any other person or persons."

XVI.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 5, as follows:

"You are instructed that if you find from the evidence that the defendant submitted to the plaintiffs samples of canned pears which samples could be properly graded according to the grades known and established among the trade in the Pacific Northwest as substandard pears, [35] and that said plaintiffs rejected or refused to approve such samples, then you shall find for the defendant and it makes no difference for the purposes of this instruction whether such substandard pears were good,

bad or indifferent so long as they were substandard pears."

XVII.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 6, as follows:

"You are instructed, if you find from the evidence that the plaintiff had made a subsale to the California Packers' Corporation, or any other person, of the pears described in the contracts in this case between the plaintiff and the defendant, and if you further find that the defendant failed to furnish to the plaintiff samples of substandard pears described in said contracts, and if you further find that the plaintiff is entitled to recover damages from the defendant for such failure, then in ascertaining such damages, you are hereby instructed that if you find that such subsale was made, as hereinabove mentioned, then the plaintiff would not be entitled to recover any more than nominal damages."

XVIII.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 7, as follows:

"You are instructed that if you find from the evidence that the contracts between the plaintiff and the defendant have been assigned to the California Packers' Corporation or to any person other than the plaintiff, then you shall find for the defendant."

XIX.

The Court erred in refusing to give to the jury the defendant's requested instruction No. 8, as follows:

> "You are requested to find for the defendant." [36]

XX.

The Court erred in giving to the jury the following instruction:

> "In this case there is only the question of the amount of the damages which is left to you. The question of who is entitled to recover on the findings and the evidence in this case was a question, as it turns out, for the Court to decide, and the Court decided on these contracts and in view of all the evidence, the plaintiffs are entitled to recover. It is left to you to say how much. At the very least plaintiffs would be entitled to nominal damages, which is one dollar. If, in your honest judgment, the plaintiffs have suffered substantial damages, it will be your duty to allow them whatever amount your judgment is."

XXI.

The Court erred in giving the following instruction to the jury:

> "According to the contracts, as I understand them, no definite date of delivery is fixed in them. Consequently, the date of delivery would be any time that in your judgment would be a reasonable time after September 12, 1924, and, consequently, the damages to

which plaintiffs would be entitled would be such as might be the difference in the price that it was to pay to the defendant and the market value of the goods in the same market during that interval of time. That is the rule of damages, the difference between what the buyer was to pay for the goods and what he could restore himself by going into the open market and buying the goods, what price he would have to pay. If the plaintiffs were to pay $2.50 a dozen for these goods, and if they could in the open market buy the same goods for $2.50, of course they would not be damaged anything beyond mere nominal damages, which is one dollar, by reason of the breach of the contracts.

On the other hand, if it was necessary for the plaintiffs to pay in the open market $2.65, $2.85, or $2.90 a dozen, the plaintiffs would be damaged the difference between $2.50 and the $2.85 or $2.90 they would have to pay on the open market."

XXII.

The Court erred in giving the following instruction to the jury:

"Now, what was the market value, of course, is an issue for you to decide. For when you once determine what [37] the market value is, you simply deduct from that the price that the plaintiffs were to pay, which will give you the amount of damage on each dozen. Mr. Hoffman, a member of the partnership, testi-

fied that at that time, September 12th to October 18, 1924, the price of like goods on the Pacific Coast—these goods are shipped by freight, and perhaps the price in one place would not be very much different from another —was $2.65 or $2.90 a dozen, which would be thirty-five or forty cents above the price that Hoffman and Greenlee were to pay to the defendants for the goods."

XXIII.

The Court erred in giving the following instructions to the jury:

"The defendant presented in its behalf, the testimony of Mr. Ribbeck, a member of the company, who testified that in September, 1924, the price was about $2.50 a dozen. How much more he does not say. From the standpoint that he is an interested party, you can draw the conclusion—though you are not bound to—that he did not mean anything less than $2.50. In other words, in the case of all interested witnesses you may consider whether they are not apt to draw the testimony just as favorably to themselves as they can, and, of course, as they deem it consistent with their oath. That would apply also to Mr. Hoffman and his testimony of $2.85 or $2.90 a dozen. Mr. Wright, also associated with the defendant, testified that the price during that time, September and October, and even to the first *lf* 1925, was $2.50, and the highest was $2.65 a dozen cans. That at the very least is $2.65, which would be fifteen cents

more than the plaintiffs were required to pay the defendant for the goods."

XXIV.

The Court erred in receiving the verdict of the jury, which was contrary to the law and the evidence.

XXV.

The Court erred in entering judgment against the defendant.

XXVI.

The Court erred in overruling the motion of the defendant for a new trial. [38]

WHEREFORE, plaintiff in error prays that the judgment of said Court be reversed.

WILLIAMS & DAVIS,
REAMES & MOORE,
Attorneys for Plaintiff in Error.

Service of the within and foregoing petition for writ of error and assignments of error and receipt of a true and correct copy thereof are hereby admitted this 10 day of November, 1926.

KERR, McCORD & IVEY,
Attorneys for Plaintiffs, Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, Copartners Doing Business Under the Firm Name and Style of "Hoffman & Greenlee."

[Endorsed]: Filed Nov. 10, 1926. [39]

[Title of Court and Cause.]

ORDER ALLOWING WRIT OF ERROR.

On this 10th day of November, 1926, came the defendant by its attorneys and filed herein and presented to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises herein.

On consideration whereof, IT IS BY THE COURT HEREBY ORDERED that the writ of error prayed for be, and the same hereby is, granted and allowed, and that upon said plaintiff in error giving bond in the sum of Three Thousand Dollars, conditioned as the law directs, that all further proceedings in said cause be, and hereby are stayed and suspended until the determination of said writ of error by the Circuit Court of Appeals.

Done in open court this 10 day of November, 1926.

JEREMIAH NETERER,
Judge. [40]

[Endorsed]: Filed Nov. 10, 1926. [41]

[Title of Court and Cause.]

WRIT OF ERROR AND SUPERSEDEAS BOND.

KNOW ALL MEN BY THESE PRESENTS:

That we, Everett Fruit Products Company, a corporation, as principal, and the American Surety Company of New York, a corporation organized under the laws of the State of New York and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee," the defendants in error, in the full and just sum of Three Thousand Dollars, to be paid to the said Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee." their attorneys, successors, administrators, executors, or assigns, to which payment well and truly to be made we bind ourselves, our successors, assigns, executors, and administrators, jointly and severally by these presents.

Signed and dated this the 10th day of November, 1926. [42]

WHEREAS, lately at a regular term of the District Court of the United States for the Western District of Washington, Northern Division, sitting at Seattle, Washington, in said District, in a suit

pending in said court between Oscar Hoffman, Elwood C. Boobar, and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee," as plaintiffs, and Everett Fruit Products Company, a corporation, as defendant, Cause No. 9286, on the law docket of said court, final judgment was rendered against the said Everett Fruit Products Company, a corporation, for the sum of Two Thousand Dollars ($2,000.00), with interest thereon, and the said Everett Fruit Products Company, a corporation, has obtained a writ of error, and filed a copy thereof in the Clerk's office of the said court to reverse the judgment of the said Court in the aforesaid suit and a citation directed to the said Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee," defendants in error, citing them to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, according to law, within thirty days from the date hereof;

Now the condition of the above obligation is such that if the said Everett Fruit Products Company, a corporation, shall prosecute its writ of error to effect and answer all damages and costs, if it fails

to make its plea good, then the above obligation to be good, else to remain in full force and virtue.

EVERETT FRUIT PRODUCTS CO.
By BEN L. MOORE,
Its Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK.

[Seal] Attest: By R. H. MELROSE,
Resident Vice-president.

E. F. KIDD,
Resident Assistant Secretary.

Approved.

NETERER,
Judge.

11–10–26. [43]

The within and foregoing bond hereby approved this —— day of November, 1926.

_____,
United States Judge for the Western District of Washington.

[Endorsed]: Filed Nov. 10, 1926. [44]

[Title of Court and Cause.]

STIPULATION AND ORDER EXTENDING TIME TO AND INCLUDING MARCH 22, 1926, TO PREPARE AND FILE BILL OF EXCEPTIONS.

Good cause appearing therefor;

IT IS ORDERED, upon stipulation of counsel, that the defendant, Everett Fruit Products Co., a

corporation, may have and take until and including March 22, 1926, in which to prepare, submit, and file herein its bill of exceptions.

Done in chambers this 13 day of March, 1926.

BOURQUIN,
Judge.

Approved March 12, 1926.

KERR, McCORD & IVEY,
Attorneys for Plaintiff.

WILLIAMS & DAVIS,
REAMES & MOORE,
Attorneys for Defendant.

[Endorsed]: Filed Mar. 13, 1926. [45]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS.

BE IT REMEMBERED that the above-entitled cause came on for trial on the 3d day of March, 1926, before the Honorable George M. Bourquin, District Judge, and a jury duly empaneled and sworn according to law, the plaintiffs appearing by their attorneys Messrs. Kerr, McCord & Ivey, and the defendant appearing by its attorneys Messrs. Williams & Davis and Messrs. Reames & Moore. After the empaneling of the jury, all of the jurors being in the jury-box, the following proceedings were had:

The plaintiffs, to sustain the issue upon their part, offered the testimony of the following witnesses as their evidence in chief.

DEPOSITION OF W. C. ZINN, FOR PLAINTIFFS.

The plaintiffs offered and read in testimony the deposition of W. C. ZINN, who testified as follows: [46]

My name is W. C. Zinn, I am thirty-nine years old, the place of my business is at 112 Market Street, and my present occupation is manufacturer's agent, dealing in groceries. And my occupation from August 1, 1924, to the present time was salesman.

Interrogatory. "State whether or not in the month of August, 1924, you had any transaction with Hoffman & Greenlee with reference to purchase by the latter of second or substandard pears from the Everett Fruit Products Company and for whom you were employed in said transaction."

Answer. "I do not recall the date, but about that time I was employed by the Walter C. Zinn Company, to offer them for the account of the Everett Fruit Products Company."

My relation to Walter C. Zinn Company, described in the contracts marked and identified as Exhibit "A" and Exhibit "A–1" attached to the deposition of Oscar Hoffman, is that of Manager. I received from the Everett Fruit Products Co. samples of canned substandard pears for inspection under said contracts. I do not remember the number of cans or the dates. It is evident that it must have been the first part of September, 1924, in view

of these telegrams (referring to telegrams consulted by the witness). I received them at 112 Market Street, San Francisco, California. The cans were given to Hoffman & Greenlee. I identified as Exhibit "E" copy of telegram sent September 12, 1924. Said telegram was admitted in evidence, and reads as follows:

EXHIBIT "E."

"September 12, 1924.

Everett Fruit Products Co.,
Everett, Wash.

You evidently sent wrong samples substandard pears cut very poor pieces and soft should have gone into pie cut sample your last years substandard and [47] cut very good nothing like this lot rush further samples.

WALTER C. ZINN COMPANY, INC.

Charge our account."

(The following appears written in pencil at the bottom of said Exhibit "E":

"Above suggested by Mr. Hofman when in office. Mentioned last year to give more weight on above and obtain pears to meet buyers approval. We did not cut last year's sample because we had none.")

"The said telegram of September 12, 1924, was suggested by Mr. Hoffman, witnessed by my stenographer, and the last part of the telegram, stating that last year's "Substandards" cut very good, and nothing like this lot—the reason I mentioned this was to give, what Mr.

Hoffman suggested, more weight, and that we did not cut any last year's or previous year's samples as we had none."

The pencil writing at the bottom of the telegram I just put on there yesterday. I handed the Notary as part of the same exhibit to be marked Plaintiffs' Exhibit "E–1" an original telegram dated September 28, 1924, reading as follows:

PLAINTIFFS' EXHIBIT "E–1."

"Everett, Wn., Sep. 28.

Walter C. Zinn Co.,

San Francisco.

Substandards same grade we always packed being accepted by other buyers California Canners representative here examined pears first of season was informed by Wright that was quality we going put into substandards positively refuse arbitrate buyer must accept or reject nothing else offer our pack standards eighteen per cent sales wish ship London boat thirtieth and want your acceptance or rejection to-morrow.

EVERETT FRUIT PRODS. CO."

I also hand the Notary copy of a telegram dated September 27, 1924, to be marked Plaintiffs' Exhibit "E–2," which said telegram reads, as follows: [48]

PLAINTIFFS' EXHIBIT "E–2."

"September 27, 1924.

Everett Fruit Products Co.,

Everett, Wash.

California Canneries and Hoffman claims you have made no tender under contract which calls for

Substandard quality considers samples only water grade in second syrup demands arbitration in usual manner advise using Canners League of California for this service.

Collect WALTER C. ZINN COMPANY, INC."

I do not remember whether Hoffman & Greenlee were furnished with copies of said telegrams, or were advised of the contents thereof prior or subsequent to the times that they were transmitted or received.

DEPOSITION OF OSCAR HOFFMAN, FOR PLAINTIFFS.

The plaintiffs then offered and read in evidence the deposition of OSCAR HOFFMAN, who testified as follows:

My name is Oscar Hoffman, my age fifty-five years, my place of business address 112 Market Street, San Francisco, California, my present ocupation is that of food broker and I was a food broker on August 1, 1924, and have been such up to and including the present time. I am senior partner in a copartnership known as "Hoffman & Greenlee." The names of the other members of the firm are Elwood C. Boobar and Frederick S. Greenlee. I have never been engaged in manufacturing canned fruits, but I have been engaged in dealing in them since 1898 during which time I dealt considerably in canned pears, and have had numerous occasions to examine all grades of pears, and other canned fruits. In buying and selling canned fruits, particularly pears, it is often necessary for [49] me

as a broker to examine and pass upon quality. In addition to this I am examiner for a very substantial firm of English buyers, who are willing to accept my judgment as to whether or not they should accept, as being up to grade, the canned fruits which they purchase in this market. In addition hereto, I was employed by the Canners League of California, during the war period, to act on behalf of the British Army and Navy Canteen Board, and to examine the packs of the various canners which had been allotted to the British Army and Navy Canteen Board. These allotments were in the nature of commandeers by the United States Government. And in such capacity I, personally, examined samples representing hundreds of thousands of cases. Canned pears are sold at varying prices and grades, and there are established trade designations and names for different grades and qualities of canned pears. The names of these grades and qualities generally known on the market of the Pacific Coast, including Everett, Washington, of canned pears are as follows: "Fancy," "Choice," "Standard," "Seconds," "Water" and "Pie." In the territories of Oregon and Washington "Second" pears are sometimes known and designated as "Substandards." I heard Mr. Feibush testify as to the characteristics and necessary requirements of these various grades and I concur in his testimony on that point. Canned pears sold as "Substandard" pears are known on the Pacific Coast, including Everett, Washington, as pears of a definite grade and quality. The quality and char-

acteristics of canned substandard pears are, as follows: Substandard pears should be packed in a 10% syrup going into the can, fruit to be tolerably free from blemishes and tolerably uniform in size with no size limits [50] of the fruit going into tins. I hereby produce for identification to be marked as Exhibits "A" and "A–1" two written contracts, the first dated August 6, 1924, covering 2,000 cases of canned Substandard pears, the second dated August 11, 1924, covering 3,000 cases of canned substandard pears for sale by the Everett Fruit Products Company to Hoffman & Greenlee, and state that these are the original contracts signed by my firm and delivered to me, through Mr. Zinn, by the Everett Fruit Products Company. Said Exhibit "A" reads as follows:

EXHIBIT "A."

(Face of Contract.)

"Everett Fruit Products Co.,
Everett, Washington.

Contract Form.

No. 2798

No. 260.

SELLS TO	Aug. 6, 1924.
Hoffman Greenlee, Buyer of San Francisco, Cal.	Consign to ————
Goods specified as per contract on reverse side.	Destination ————
Walter C. Zinn Co., Broker.	Routing ————
Address San Francisco, Cal.	Time of Shipment when packed

Sign on Reverse Side.

1M 10–12–23 E. P. Co.–27547

Cases	Dozens	Size	Grade	Variety	Brand	Price per Doz.	Do not Use these Columns.
2000	4000	#2½	Sub. Std.	Pears		$2.50	

Less 4% Brokerage.

1924 pack subject approval sample.

Price F. A. S. Steamer, Everett, Wash.

TERMS: 2% 10 days N/30.

S/D–B/L.

If for export, ½ of 1% swell allowance.

If buyers labels, usual label allowance.

Woodcases.

Buyer's Copy. [51]

(The following appears on the back of the contract.)

"FRUIT and VEGETABLE CONTRACT.

or

As per Specifications on Reverse Side.

TERMS OF PAYMENT. Cash less 2%, payable in New York or Seattle exchange when paid within ten days or on receipt of invoice with documents.

MARINE INSURANCE. On all shipments by water to Atlantic Coast or Gulf ports to insure for buyer's account and expense to cover buyer's cost with 10% added. English form of contract with 3% particular average on each mark.

CONDITIONS. The prices specified are for goods "Free on Board" at factory. The seller reserves the routing of freight. Goods at risk of buyer from and after shipment although shipped to seller's order.

If seller should be unable to perform all its obligations under this contract by reason of a strike,

fire or other circumstances beyond its control, such obligations shall at once terminate and cease.

In case of short pack by reason of which seller is unable to make full delivery of any of the grade specified, it is mutually agreed that deliveries are to be prorated.

GOODS TO BE SHIPPED AT SELLER'S DISCRETION AS SOON AS PRACTICABLE AFTER PACKING UNLESS OTHERWISE SPECIFIED.

FRUITS remaining unshipped on December 31st following the date of this contract shall be billed and paid for on that date.

Buyer agrees to pay said invoices on demand or protect draft for invoice value, on presentation, with warehouse receipt attached, and seller agrees to store said goods and insure them in selected Insurance Companies for buyer's account against loss or damage by fire for 75 per cent of invoice cost. Buyer to pay one and one-quarter cents per case per month to cover cost of both storage and insurance; fractional months at full rate; charges to accrue from the date of warehouse receipt. Seller reserves the right to move and store said goods at buyer's expense in public warehouses if goods are not ordered out by buyer prior to March 1st following date of billing as above.

SWELLS. Guaranteed to July 1st following packing season. Can markings must be furnished with each report of swelled goods. Seller reserves the right of ordering damaged goods returned, but in case seller directs goods destroyed, swell claim

will be paid only upon written statement from food inspector that goods have been destroyed. [52]

GUARANTEE. Seller guarantees goods covered by this contract to conform with the requirements of the National Food and Drugs Act of June 30th, 1906, except seller is relieved from any responsibility for misbranding when goods are not shipped under its labels.

This contract to be binding upon the seller must be confirmed in writing by the seller, who, however, shall not be responsible for the performance thereof, unless a copy properly signed by the buyer is delivered to the seller within 20 days of the date thereof.

ARBITRATION. Any dispute arising as to the proper fulfillment of this contract, to be settled by arbitration, by the regular canned goods and dried fruit arbitration boards, either in the cities of New York, Chicago, San Francisco, or Portland, unless otherwise mutually agreed upon. If question is as to quality, actual samples to be drawn and submitted to such board as selected, their decision to be binding upon both parties to this contract. Party against whom decision is rendered, shall pay arbitration fees and expenses incurred. If decision is rendered that seller has complied with contract, invoice if unpaid shall become due and payable at once. If decision is rendered against seller, arbitrators shall determine amount of allowance, which amount shall be payable at once. If the arbitrators decide the seller has not shown good faith in making delivery hereunder, the buyer shall be entitled to another tender in full compliance of this contract.

No unimportant variation in the execution of this contract shall constitute basis for claim.

Buyer HOFFMAN & GREENLEE.
E. C. BOOBAR.
EVERETT FRUIT PRODUCTS CO., Seller.
Broker ————. By F. B. WRIGHT.

Said Exhibit "A–1" reads as follows:

EXHIBIT "A–1."

(Face of Contract.)

"Everett Fruit Products Co.,
Everett, Washington. No. 2809
Contract Form.
No. 269.

SELLS TO Aug. 11, 1924.
Hoffman & Greenlee, Consign to ————
Buyer.
of San Francisco, Cal.
Goods specified as per Destination ————
contract on reverse side. Routing ————
Walter C. Zinn Co., Inc., Time of Shipment
Broker. when packed
Address San Francisco,
Cal. Sign on Reverse Side.

1M 10–12–23 E. P. Co.–27547

[53]

Cases	Dozens	Size	Grade	Variety	Brand	Price per Doz.	Do not use these Columns
3000	6000	#2½	Sub. Std.	Pears	Bartlett	$2.50	

less 4% Bkg.
1924 pack
Price F. A. S. Steamer, Everett, Wash.
TERMS: 2% 10 days N/30
S/D–B/L
subject approval sample before
shipment
buyers option labels, less
usual label allowance.
subject to pro rata delivery
Buyer's Copy.

(The back of Exhibit "A–1" is identical with the back of Exhibit "A" as hereinabove set forth down to and excluding the signature. The signature on the back of Exhibit "A–1" appears as follows:

Buyer HOFFMAN & GREENLEE
EVERETT FRUIT PRODUCTS CO., Seller,
By F. B. WRIGHT)

Interrogatory: "State whether or not you received from the Everett Fruit Products Company samples of canned sub-standard pears for inspection. If you answer this interrogatory in the affirmative, state when and where you received the samples and the number of cans received."

Answer: "The Everett Fruit Products Company sent samples to Walter C. Zinn & Company, and, at the request of Mr. Winn, I went to his

office to examine the samples. I remember absolutely going to Mr. Zinn's office, at his request, and examining the samples there. This was on September 12, 1924." [54]

These samples were examined in the office of Walter C. Zinn Company, and I do not recall that there was anyone present outside of Mr. Zinn and myself and the stenographer. Later in the day I took some of these unopened samples over to the California Packing Corporation and cut them in the presence of Mr. Pratt and Mr. Dodd, and found the quality identical with those that had been cut in the office of Mr. Zinn.

Interrog. 11. "If you examined the said pears, state what the examination disclosed as to the grade and quality of said pears."

Answer. "We cut some of these samples, which disclosed that the goods were so palpably not up to grade that we felt it useless to cut further. These products were soft and mushy and full of holes and unfit for the grade."

Mr. MOORE.—"May it please the Court, we move to strike that answer of the witness on the ground it is not responsive and does not state facts, merely a conclusion of the witness."

* * * * * * * * * *

The COURT.—"I think the answer may stand. It is true part of that is in the nature of a conclusion, yet it may stand. The motion will be denied. Objection overruled."

Mr. MOORE.—"Save an exception."

The COURT.—"Let it be noted."

I do not have any of the sample cans submitted which are unopened or the contents of which have been preserved, but I did have one can which I opened with Mr. William Beesemyer, of Los Angeles, who visited me some time shortly after my examination of these pears in Mr. Zinn's office. Mr. Beesemyer is engaged in the same line of work, and had just returned that day from a visit to canneries in Oregon and Washington where he went for the purpose of making an examination of canned pears. Walter C. Zinn conferred with me on or about September 12, 1924. [55] As previously stated, the quality of the fruit was palpably unfit for the grade, so much so that Mr. Zinn dictated, in my presence, a telegram to the Everett Fruit Products Company and furnished me with a copy of the same, which said copy I offer in evidence as Exhibit "G." The Court sustained the objection of the defendant to the introduction of said Exhibit "G.") Mr. Zinn had previously extolled the quality of the fruit packed by the Everett Fruit Products Company, and, to demonstrate that they could and had packed proper quality for the grade, he cut a sample tin of their previous year's pack, taking some from his sample shelf. And the same was of proper quality and grade. The samples were so palpably off that we thought that samples of a poorer grade had been submitted to us in error. Mr. Zinn was very indignant that the Everett Fruit Products Company should send samples of such poor quality, and, personally, dictated the telegram to them, a copy

of which is marked Exhibit "G" (being the above-mentioned Exhibit "G" which was excluded from the evidence).

I have had, during all of the periods which I have mentioned as being connected with the business, personal contact with the market price for "Sub-standard" pears of the character described in the contracts, on the Pacific Coast, in the Northwest as well as in California. To the best of my recollection, it was impossible to purchase "Seconds" or "Sub-standard" pears on either September 12, 1924, or October 18, 1924, in lots such as represented by the contracts Exhibits "A" and "A–1." Small parcels were available at $2.85 to $2.90 per dozen, at both times, with a gradual hardening market as the year progressed. By "hardening market," I mean, increased value and increased difficulty in securing supplies. [56]

Mr. MOORE.—"Pardon me just a moment. We move to strike the testimony of this witness as to the market price of small lots on the ground that the witness has already testified that there was no market and no market price, therefore, on lots of this size.

The COURT.—"Well, I think his evidence is competent as to small lots, furnishing some basis on which the jury might arrive at the value of large lots. The motion will be denied."

Defendant's exception noted.

Interrog. 18. "State what the interest of the California Packing Company, a corporation, in the contracts for pears sold under contracts marked

and identified as plaintiff's Exhibits 'A' and 'A–1' is."

Answer: "The California Packing Corporation bought these pears from Hoffman & Greenlee under the same terms and conditions, as far as quality is concerned, under which I purchased them from the Everett Fruit Products Company."

DEPOSITION OF ROY L. PRATT, FOR PLAINTIFFS.

The plaintiffs then offered and read in evidence the deposition of ROY L. PRATT, who testified as follows:

My name is Roy L. Pratt, my age is forty years, my business address is 101 California Street, San Francisco, California, my present occupation is that of sales manager for the California Packing Corporation, and my occupation has been the same from August 1, 1924, to the present time. We have no relationship with Hoffman & Greenlee, except that, at times, we employ them as brokers. I have been engaged in dealing in and manufacturing canned fruits twenty-two years. In my capacity as sales manager, it is my duty to both sell and buy canned fruit as well as to be thoroughly acquainted with all grades, [57] as packed by ourselves and other concerns on the Coast, and to be thoroughly posted as to grades acceptable to the trade. In buying and selling canned fruits, it is part of my duty to personally examine samples, to determine the qualities and correctness of vari-

(Deposition of Roy L. Pratt.)

ous grades handled. Canned pears are sold at varying prices and grades. There are established trade designations and names for the different grades and qualities of canned pears. These are clearly set forth in certain specifications adopted by the Northwest Canners Association and California Canners League. These grades are known to the grade as "Fancy," "Choice," "Standard," "Second" or "Sub-standard," "Water" and "Pie." I heard the description of these grades, as stated by Feibush, and I concur in his description as to what he described for each grade, as it conformed to those specifications adopted and published by the two associations of canners mentioned. Canned pears sold as "Sub-standard" pears are known on the Pacific Coast, including Everett, Washington, as pears of a definite grade and quality. The specifications for "Sub-standard" pears are as follows: No size limits, fruit to be tolerably free from blemishes and tolerably uniform in size, syrup going in 10 degrees.

I examined samples of canned pears received by Hoffman & Greenlee, from the Everett Fruit Products Company, on September 12, 1924, in company with Mr. Oscar Hoffman and Mr. Henry Dodd. These samples were examined in the office of the California Packing Corporation, and several cans were cut and examined in that office. The samples examined showed the fruit to be mushy, overly soft, many pieces broken, and throughout all the samples, pieces were noted that

(Deposition of Roy L. Pratt.)

had been badly mutilated, apparently to cut out worms or other defects. [58]

In my capacity as sales manager of the California Packing Corporation, it is imperative that I be constantly in touch with the market, and all grades of canned pears, including "Sub-standard," and I have been thoroughly in touch with the market and conditions of the market on this grade of pears on the Pacific Coast, during the year 1924. The market on canned pears, on September 12, 1924, was very firm, due to the fact that this particular grade of pears was scarce and difficult to find, no lots of any consequence being available. The price on September 12, 1924, F. A. S. steamer, Pacific Coast ports, including Everett, Washington, was about $2.90 per dozen. From September 12, 1924, to October 18, 1924, the market continued to rule very firm and "Sub-standard" pears more difficult to obtain. If any price change occurred, it was slightly upward.

Interrog. 14. "State what the interests of the California Packing Company, a corporation, in the contracts for pears sold under contracts marked and identified as Plaintiffs' Exhibits 'A' and 'A–1' are."

Answer. "The interest of the California Packing Corporation in contracts marked Exhibit 'A' and 'A–1' is that the pears represented by these contracts were purchased by the California Packing Corporation from Hoffman & Greenlee."

DEPOSITION OF HENRY DODD, FOR PLAINTIFFS.

Plaintiffs offered and read in evidence the deposition of HENRY DODD, who testified as follows:

My name is Henry Dodd, my age fifty-one, my business address 101 California Street, San Francisco, California, my present occupation that of manager of the quality and service department of the California Packing Corporation, and that has [59] been my occupation from August 1, 1924, to the present time. I have no relationship to the copartnership known as "Hoffman & Greenlee." For the last fifteen years, it has been my duty to examine the various packs put up by each of our factories of all kinds of canned foods, which they manufacture, including pears, to determine whether the quality of the pack was up to the proper grade or not. I also, for the same length of time, have examined samples of all canned fruits and vegetables purchased by the California Packing Corporation, and cut several thousand cans, including pears, to determine the quality of the foods. During the packing season the samples of the various packs are examined by me every day, to insure that they are up to the grade for which they were packed. This includes all of our factories, which are packing pears of various grades, including "Sub-standard" which we pack up north, and the "Seconds" which we pack in California. In speaking of my duties for the California Packing

(Deposition of Henry Dodd.)

Corporation, I include the length of time which I have served with the California Packing Corporation and its predecessors, which were engaged in the same business as the California Packing Corporation is at the present time. Canned pears are sold at varying prices and grades. There are established trade designations and names for different grades and qualities of canned pears. Those designations and names are "Fancy," "Choice," "Standard," "Sub-standard" or "Seconds," "Water" and "Pie." I heard Mr. Fiebush testify, giving the requirements and characteristics of each of the grades I have mentioned and I concur with the specifications which he gave. Canned pears sold as "Sub-standard pears" are known on the Pacific Coast, including Everett, Washington, as pears of a [60] definite grade and quality.

The grade "Sub-standard" pears are of the same grade as what is known in California as "Second" pears. The specifications for "Sub-standard" pears are as follows: No size limit, syrup to be of 10 degrees balling going into the cans, fruit to be tolerably free from blemishes and tolerably uniform in size. The degree of syrup and the percentage of syrup are synonymous terms. In company with Oscar Hoffman and R. L. Pratt I made an examination on the 12th of September, 1924, of samples of canned pears received by Hoffman & Greenlee from the Everett Fruit Products Company. I examined the cans in the office of the California Packing Corporation on September 12,

(Deposition of Henry Dodd.)

1924. There were four cans examined. There was hardly a well-formed half in any of the cans. There were a great many broken pieces and pieces badly trimmed where worm marks or other blemishes had been cut out. Several of the pieces in each can were soft and mushy. The syrup in each can was very cloudy, and a little dirty. They were not fit for "Sub-standard" or even "Water" grade, and would not have made a good "Pie" on account of the light fill of fruit in the can. On "Pie" fruit now we pack all solid pack, that is to say, the fruit is supposed to be filled in the can and no water added. Therefore, these cans, showing as they did considerable syrup, would not have been fit for any established grade. My duties do not keep me in touch with the market conditions, and I am unable to say what was the market value of said pears.

DEPOSITION OF W. F. BEESEMYER, FOR PLAINTIFFS.

Plaintiffs offered and read in evidence the deposition of W. F. BESSEMYER, who testified as follows: [61]

My name is W. F. Beesemyer, age thirty-eight, business address 921 Washington Boulevard, Los Angeles, California. My occupation from August 1, 1924, to the present time is that of merchandise broker. I have been acquainted with Mr. Oscar Hoffman, of Hoffman & Greenlee, for some ten years. In reference to experience I have repre-

(Depositiin of W. F. Beesemeyer.)

sented the California Packing Corporation for some fifteen years as well as several other large canners of fruits and vegetables in the State of California. I buy annually in the Pacific northwest large quantities of pears for export. In both of these capacities I examine and am generally familiar with canned goods of all kinds, including pears. It is a part of my business to know, and I do know, the various classifications of packs and all details regarding canned fruits.

Pears from the Pacific Coast are sold according to specific grades and are priced according to grade. I am familiar with the various grades of canned pears. There are established trade designations and names for different grades and qualities of canned pears. The established grades generally known on the Pacific Coast, including Everett, Washington, and the characteristics of each, are as follows: "Fancy," "Choice," "Standard," "Substandard," "Water" or "Pie." (The witness stated the specifications and characteristics for each of said grades.) Specifications for "Substandard" pears are as follows: no size limits, syrup 10% of sugar when packed, fruit to be palpably free from blemishes and tolerably uniform in size. "Sub-standard" pears are generally known on the Pacific Coast, including Everett, Washington, as "Seconds," the specifications for which are exactly the same as for substandards. In company with Mr. Oscar Hoffman, at the office of Hoffman & Greenlee, [62] I cut a sample of the

(Depositiin of W. F. Beesemeyer.)

pears packed by the Everett Fruit Products Company late in the summer or early in the fall of 1924. This sample was clearly marked with a label showing "Sub-standard." Upon opening the can and making examination, I found the fruit to be extremely poor for the grade; in fact, it looked more like Pie fruit or fruit that should never have been put in a can at all. Some of the pieces were broken in two and others were badly gouged. Two pieces had holes clear through, evidently caused by cutting out worm-holes. This sample was one of the poorest cans of pears I have ever seen, and was in no way up to the grade for which it was intended. The can opened was not "Sub-standard" but the fruit was Pie or worse.

Mr. MOORE.—"At this time we move to strike all of the testimony of Mr. Beesemyer relating to the can examined, upon the ground that the can examined has not been identified as one of the cans sent by the Defendant Company."

The COURT.—"This is the only identification you have?"

Mr. KERR.—"Yes, that is the only one.

The COURT.—"Motion granted. It is not identified as a sample of this particular pack."

Thereafter Mr. Kerr, attorney for plaintiffs, re-offered the deposition of Mr. Beesemyer, saying to the Court, "I call your attention to page 20 of the deposition of Mr. Hoffman, where he says he opened one can with Mr. Beesemyer."

The COURT.—(After examining deposition of

(Depositiin of W. F. Beesemeyer.)

Mr. Hoffman.) "That serves as a connecting link of identification to render the testimony of Mr. Beesemyer permissable. You may produce it now. * * * Gentlemen of the jury, you will understand that at the time the testimony of Mr. Beesemyer was stricken in reference to the examination of one can of samples which Mr. Hoffman testifies was furnished from the defendant, it was stricken because at that time we had overlooked the fact there was sufficient identification of that [63] can. Mr. Hoffman testifies in his deposition that it was one of the cans that he and Beesemyer opened together. Consequently the testimony of Mr. Beesemyer, where he testified the fruit was of poor grade, some broken badly, mushy, and one piece was of Pie quality or worse, should not have been stricken. The motion striking it is set aside and the effect of the testimony is before you for consideration."

Mr. MOORE.—"Save an exception."

The COURT.—"Exception noted."

Thereupon, the plaintiffs rested their case in chief, and so announced to the Court. Immediately upon the plaintiffs resting their case, the following transpired:

Mr. MOORE.—"At this time, may it please your Honor, I desire to make a motion addressed to the Court. Shall we submit it in the presence of the jury?"

The COURT.—"What kind of a motion?"

(Depositiin of W. F. Beesemeyer.)

Mr. MOORE.—"A challenge to the sufficiency of the evidence and motion for nonsuit."

The COURT.—"This case of Slocum vs. New York Life Insurance, I have not understood; I don't understand it. They say in the United States District Court there can be no motion for nonsuit granted. I do not agree with that decision as laid down, completely, that when a case is tried to the jury, it must be terminated by the jury. I do not understand that case at all. I cannot entertain the motion for nonsuit. I do not think there is anything in the record for it."

Mr. MOORE.—"At this time the defendant challenges the sufficiency of the evidence produced on behalf of plaintiffs to sustain any verdict or judgment, and moves the Court for its order granting a nonsuit of plaintiffs' case."

The COURT.—"The motion is denied. Proceed with the defense."

To the ruling of the Court denying the defendant's challenge to the sufficiency of the plaintiffs' evidence, and denying defendant's motion for nonsuit, the defendant duly excepted and the same was duly noted and allowed. [64]

DEFENDANT'S CASE IN CHIEF.

Thereupon, the defendant, to sustain the issue on its part, offered in evidence the testimony of the following witnesses:

TESTIMONY OF HENRY RIBBECK, FOR DEFENDANT.

The defendant offered in evidence the testimony of HENRY RIBBECK, who, being first duly sworn, testified on direct examination, as follows:

My name is Henry Ribbeck. I live at Everett, Washington, am now vice-president and general manager of the defendant, and have held that position for nearly one year. The defendant company is and has been engaged in the business of canning fruits and vegetables, and was engaged in that business in 1924. As my duty with reference to my work in connection with the company, I inspect samples of goods packed or canned by my company,—samples of each day's pack the following morning to verify the quality. I am familiar with the character of goods that have been packed by the company, and familiar with the pack of canned pears that were packed by the company for the season of 1924. I am familiar with the different grades of pears that are packed by canneries in the Pacific northwest. There are six grades, and they are known as fancy, choice, standard, substandard or seconds, water and pie grades. The defendant's exhibit, marked for identification "A–1," sets forth the various grades of pears as packed by the canneries in the Pacific northwest. The Everett Fruit Products Company packed some substandard pears for the season of 1924. I am familiar with the kind of pears that were packed under that grade.

(Testimony of Henry Ribbeck.)

The [65] pears as packed under that grade were uniform throughout the season. Some samples of substandard pears were forwarded to our brokers in San Francisco for Hoffman & Greenlee,—on September 9, 1924, and on September 22, 1924. These samples were selected from our general stock in the warehouse, and were representative of our pack for the season of 1924. On the first shipment of samples, we sent twelve samples, and on the second shipment we sent four samples. The specifications for the substandard grade of pears are that the pieces shall be tolerably uniform, and it shall be such fruit as is not fit for the other higher grades, and shall have a 10 degree syrup. The pack of substandard pears for our company during the season 1924 conformed to those specifications. The pears as so packed were tolerably free from blemishes, and they were tolerably uniform in size. During September of 1925, I examined some samples of substandard pears packed by the Everett Fruit Products Company during the season of 1924 in Seattle. Those samples were opened in September 1925 in the office of Burrington, Case & Gibson, Seattle, Washington. They were samples of seconds or substandard pears packed by the Everett Fruit Products Company in 1924. At the time these samples were opened, there were present Mr. Gibson of that firm, Mr. Charles Allen, and our own two attorneys. At that time four samples were opened and examined. They were samples of our pack of 1924, and were the same kind of sam-

(Testimony of Henry Ribbeck.)

ples that were sent to Zinn & Company of San Francisco.

Q. "Were you familiar with the market price of substandard pears in the Pacific northwest during September of 1924?"

A. "I know about what the value was, yes." [66]

Q. "What was the market value of substandard pears in September, 1924?"

A. "About $2.50 per dozen."

Q. "State whether or not there was any increase in that price up to the 12th of September, 1924."

A. "There was not to my knowledge."

On cross-examination the witness, Henry Ribbeck, testified as follows:

Q. "Was there any increase up to October 18th, 1924?"

A. "I am not familiar with the prices beyond September."

My familiarity with the price is not limited to what I have sold, nor what my brokers sold. I got my information as to market price in September, and prior to September, from sales by other brokers that were reported to me. We aim to keep track of the market generally.

Q. "Did you get it through trade reports or anything of that kind?"

A. "Trade reports and conferences with other buyers, brokers and canneries."

After we had sold out our pack, we kept track of the market more or less, but I would not consider

(Testimony of Henry Ribbeck.)

myself qualified to give an opinion during the month of October.

Q. "Didn't you answer that after September 12th you didn't keep track of the market?"

A. "I did not."

Q. "I misunderstood you. So you did keep track of the market up to October 1st?"

A. "I was more or less familiar with the values later in the season."

Q. "Now, you say that you sent samples to Hoffman & Greenlee on September—"

A. "September 9th and 22d." [67]

Q. "Have you any letter from Hoffman & Greenlee in which they acknowledged receipt of the second bunch of samples?"

A. "I don't think Hoffman & Greenlee ever acknowledged them."

We have letters from our brokers, Zinn & Company, saying that the samples were received. When I say that we sent four samples to Hoffman & Greenlee, I mean we sent them to Zinn & Company, our brokers, for delivery to Hoffman & Greenlee. Our broker reported that they delivered them. I have a letter from Zinn & Company reporting that.

(Here plaintiffs' attorney, Mr. Kerr, hands to the witness Plaintiffs' Exhibit marked 3 for identification, being a letter of September 27, 1924, from Zinn & Company to the defendant, attached to which was what purported to be a copy of the

(Testimony of Henry Ribbeck.)
letter dated September 26, 1924, from Hoffman & Greenlee to Zinn & Company,)

Q. "Did you state a few moments ago that that is the letter which acknowledges receipt of four cans of pears sent by you to Zinn & Company on September 22d, 1924?"

A. "Well, it does not specify the number of cans received. It merely acknowledges having inspected samples of seconds,—of the pears received from our company."

It does not refer to whether it was samples sent on September 9th or September 22d.

(Plaintiffs' Exhibit marked 3 for identification, consisting of said letters, was here offered in evidence, and upon the defendant's objection thereto, the objection was sustained.)

TESTIMONY OF F. B. WRIGHT, FOR DEFENDANT.

The defendant then offered in evidence the testimony of F. B. Wright, who, being first duly sworn, testified on direct examination, as follows: [68]

My name is F. B. Wright. I reside at Everett, Washington. I am vice-president and sales manager of the defendant company, Everett Fruit Products Company, and have sustained that relation for seven years. I was connected with the company in the season of 1924, and was familiar with the pack of the company at that time. I am familiar with the different grades of pears as graded by the Northwest Canners' Association.

(Testimony of F. B. Wright.)

The printed pamphlet, marked Defendant's Exhibit "A–1" for identification, shows the grades of pears as fixed by the Northwest Canners' Association, and observed by the trade in buying and selling pears in the northwest. It correctly sets forth the grades.

(Said Exhibit "A–1" was thereupon offered and received in evidence, without objection, and shows the following grades and respective specifications therefor.)

DEFENDANT'S EXHIBIT "A-1."

"PEARS Grade	Pieces per No. 2½ Can Count	SYRUP % of sugar when packed	DESCRIPTION
FANCY.....	Not less than 6, not more than 12 pieces. No single parcel should vary more than 4 pieces per can.	40°	Fruit to be of very fine color, ripe, yet not mushy and free from blemishes, halves uniform in size and very symmetrical.
CHOICE.....	Not less than 6, not more than 15 pieces. No single parcel should vary more than 5 pieces per can.	30°	Fruit to be of fine color, ripe, yet not mushy and free from blemishes, halves uniform in size and symmetrical.
STANDARD..	Not less than 6, not more than 21 pieces. No single parcel should vary more than 6 pieces per can.	20°	Fruit to be of reasonably good color, ripe yet not mushy and reasonably free from blemishes, halves reasonably uniform in size and reasonably symmetrical.
SUB-STANDARD..	No size limits	10°	Fruit to be tolerably free from blemishes and tolerably uniform in size. Wholesome fruits unsuited for above grades. [69]
WATER OR PIE ..	No size limits.		

(Testimony of F. B. Wright.)

I was familiar with the pack of the Everett Fruit Products Company in 1924, and was present at the plant. I was three or four times a day on the floor examining pears. I was examining the pears in the process of their being canned or preserved or put up in cans. They were packed partially under my supervision. The pack of substandards in that year was uniform. The pears packed by our company that fall as substandards were packed in ten degree syrup. They were tolerably free from blemishes, and they were tolerably uniform in size. I was familiar with the samples that were sent to Zinn & Company in September, 1924. Those samples were from our regular substandard pack for that year, and of the same quality and grade as the rest of our substandard pack.

Q. "Was there any inspection made of your substandard pack at your factory by Mr. Longwell in August or September, 1924, or in August, 1924?"

A. "There was a gentleman in there who said that he wanted to see the pears 'that were being packed for Hoffman & Greenlee."

Q. "Did he state whether or not he was also representing the California Packers?"

A. "I am quite sure that he did."

He made an inspection at that time. He did not make any statement at that time as to the result of his inspection or his attitude toward the substandard pack, but the house—that is, our broker, Zinn & Company, did write afterwards that they were not exactly satisfied with his report. I was familiar

(Testimony of F. B. Wright.)

with the market price of pears in the Pacific Northwest in the vicinity of Everett free alongside steamer in the fall of 1924, and with the price free on board Everett. The market price f. o. b. Everett of substandard pears on the 12th of [70] September, 1924, was $2.50 per dozen cans. I know what the market was from the period of September 12th, 1924, on to, say, about October 18th, 1924. I think the highest market price f. o. b. Everett of substandard pears during that period of time, that we had any record of, was $2.65 per dozen cans. The 1924 pack of substandards was ready for delivery from August 25th on.

The witness F. B. WRIGHT, on cross-examination, testified as follows:

My position with the defendant is that of sales manager. As to other duties, I am also vice-president, and look after the production to a certain extent. In 1924 we had no pears of this grade for sale. My statement that the market price was $2.50 at that time is based on offers being made to us by other brokers, by brokers who were looking for pears at different times. The brokers were coming to us and offering to buy them at $2.50. We had none to sell at all. Our pack was sold out. The highest price that I know of that pears went to between September 1st and January 1st was $2.65. That was an actual sale.

Q. "Now, you say that Mr. Longwell was at your plant in August. Do you remember about what date in August?"

(Testimony of F. B. Wright.)

A. "It was along about the 15th or 20th, in that neighborhood. Now, I want to make myself clear. I do not know whether that was the gentleman's name or not."

There was some gentleman there at that time, and Mr. Baxter, of the Kelley-Clarke Company here, was with him. Mr. Baxter and Mr. Longwell went through our factory, and I [71] was present during the time. They made no objection to the quality of the goods that were going into our pack.

Upon redirect examination, the witness F. B. WRIGHT testified, as follows:

The same gentleman, who has been referred to as Mr. Longwell and who visited our plant in August, 1924, was back on a visit to our plant in October of that same season.

Q. "At that time did he make any inspection of your pack?"

A. "No, he refused to inspect."

Q. "Did you offer him an inspection?"

A. "I did."

Q. "What did he say, if anything, when he refused to inspect?"

A. "He said that if the pears were no different from those that we had sent samples of there was no use in looking at them."

Q. "Did he then inspect or not?"

A. "He did not."

On September 12, 1924, we did have a stock of substandard pears, but we did not have a stock of

(Testimony of F. B. Wright.)

pears over and above our contract requirements at that time, and that was what I meant by my answer to counsel on cross-examination.

Upon recross-examination, the witness F. B. WRIGHT further testified, as follows:

Q. "You say Mr. Longwell said if the pears were no different than the ones he had examined before or the ones that samples were submitted on, he did not wish to examine?"

A. "He did." [72]

Q. "What did you state to him?"

A. "I told him the pears, that they are in the warehouse and we would be glad to show samples."

Q. "Did you state or did you not state to him that they were the same as the samples that were submitted?"

A. "I told him our pack was practically all the same, and the samples submitted were taken out of the regular second pears."

Q. "Did you or did you not tell him that the samples that were submitted were the same as he would be shown if he examined in October?"

A. "I did."

We had a stock of pears on hand, but had contracts to dispose of all of them. We were shipping out as fast as we could. We had contracts with a number of different parties; some for export, and some for Houston, Texas.

Q. "Did you have contracts with Powell Brothers of London?"

A. "I cannot—"

(Testimony of F. B. Wright.)

Mr. MOORE.—"Objected to as irrelevant, immaterial, and not proper cross-examination."

Q. "For this grade of fruit?"

The COURT.—"I think he may answer."

A. "I would have to examine the records to find out just who those sales were made with."

Q. "Do you not know that your company had a contract to deliver to Powell Brothers five hundred cases of substandard pears at Liverpool and 1296 cases of pears at London?"

Mr. MOORE.—"The same objection, may it please your Honor."

The COURT.—"The same ruling."

Mr. MOORE.—"Save an exception."

A. "I don't remember of that name. A lot of sales was assigned." [73]

Q. "Do you know whether Mr. Weston, of Powell Brothers was identified with that sale or contract?"

A. "I don't."

Q. "You know that pears from your company were shipped to Liverpool and London in the fall, involving substandard pears of the 1924 pack?"

Mr. MOORE.—"Objected to as irrelevant, immaterial and not proper cross-examination."

The COURT.—"Of what kind?"

Mr. KERR.—"Of the 1924 pack."

The COURT.—"He may answer."

Mr. MOORE.—"Save an exception."

A. "We shipped a lot of fruit to London in 1924."

(Testimony of F. B. Wright.)

Q. "You answer the question "Yes" then, do you?"

A. "What was the question."

(Question read.)

A. "I cannot say they were substandard."

Q. "Second pears?"

A. "I would not say; I would not answer that."

I believe we had a contract in the fall of 1924 for delivery of substandard pears of the 1924 pack to California Canners' Corporation of California.

DEPOSITION OF W. B. LONGWELL, FOR DEFENDANT (CROSS-EXAMINATION).

The defendant then offered and read in evidence that portion of the deposition of W. B. Longwell setting forth the cross-examination of the witness, the said deposition having been taken on behalf of the plaintiff, and the direct examination not having been read in evidence in the plaintiffs' case in chief. [74]

The witness W. B. LONGWELL, on cross-examination, testified as follows:

I am employed by California Packing Corporation. There is no relationship whatever existing between the California Packing Corporation and Hoffman & Greenlee, the plaintiffs in this action.

Q. "Had Hoffman & Greenlee assigned to the California Packing Corporation its contract with the Everett Fruit Products Company?"

A. "Yes, sir."

Q. "And the California Packing Corporation be-

(Testimony of F. B. Wright.)

came the owner of those contracts by an assignment, did it?"

A. "Yes, sir."

Q. "And you, as the agent of the California Packing Corporation, the owner of these contracts, were inspecting these pears?"

A. "Yes, sir."

Q. "The pears were sold subject to approval of samples, you understood that, didn't you?"

A. "That is part of the terms of the contract."

Q. "And you, as the authorized agent of the California Packing Corporation, after inspection refused to approve the sample, is that true?"

A. "No, sir."

Q. "Did you approve the sample?"

A. "No, sir."

Q. "You inspected them as the agent of the holders of the contract and did not either approve or disapprove the samples?"

A. "I inspected them after only a three days' run on the pack, and, naturally, no inspection of that kind could be final."

Q. "And then you state that your inspection at the time in August when you were present at the plant of the Everett Fruit Products Company was not final and would have no effect, is that it?" [75]

A. "It would have some effect if the goods tendered on August 20th represented the parcel of goods, but the parcel was not packed at that time."

Q. "And you don't know whether the parcel, as finally packed, was the same as you saw, that were

(Testimony of F. B. Wright.)

being packed at the time that you were at the plant, or not?"

A. "No, sir. From the statement of Mr. Ribbeck and Mr. Butler and Mr. Wright, that the parcel I wanted to inspect on October 9th, was the same as I had looked at on August 20th, I told them that the final passing on those goods would have to be up to the San Francisco office, as I would not assume the responsibility of accepting goods of the kind that I had seen."

Q. "But the samples that you did inspect, when you were there in August, you disapproved of?"

A. "They were not samples of second pears."

Q. "I am not asking you what they were. Will you please answer my question? You disapproved, didn't you, the samples that you inspected there in August?"

A. "There were no samples of second pears submitted to me. They were pie pears, and I told them so."

Q. "Whatever they were, you refused to approve them, did you not?"

A. "There was not a question of approval at stake, at that time."

* * * * * * * * * * *

Q. "You inspected some samples at the plant of the Everett Fruit Products Company in August, 1924, did you not?"

A. "Correct."

Q. "You refused to approve those samples, didn't you?"

(Testimony of F. B. Wright.)

A. "I just got through telling you I would not approve anything that would not represent the parcel."

* * * * * * * * * * *

Q. "Will ask you this question: After your inspection at the plant in August, you refused to approve those samples, regardless of what kind of samples they were?"

A. "Yes, sir." [76]

Q. "And in October you refused to make further inspection, did you not?"

A. "Yes, sir."

TESTIMONY OF J. C. BUTLER, FOR DEFENDANT.

The defendant then offered in evidence the testimony of J. C. BUTLER, who testified as follows:

My name is J. C. Butler. I reside at Everett, Washington; I am engaged in the fruit canning business in connection with Everett Fruit Products Company in the capacity of general superintendent, and was such general superintendent in the season of 1924, and was supervising the packing of pears at that time. In my supervision of the packing I was actually in the plant all the time, and inspected the fruit and inspected it in the process of canning or processing. I inspected the grades. I have been in the canning business about fourteen years, and am familiar with the grades and specifications for the several grades of pears in the Northwest as fixed by the Northwest Canners' Association. I have

(Testimony of J. C. Butler.)

heard those grades and specifications described here in the testimony this morning, which correctly states said grades. I was familiar with the pack of substandard pears in our company, in our plant in 1924. That pack was uniform. The substandard pears were packed in ten degree syrup. The pears of our substandard pack were tolarably free from blemishes, and were tolerably uniform in size. The pears packed by us as substandards were in the substandard grade as fixed by the Northwest Canners' Association.

On cross-examination, the witness J. C. BUTLER [77] testified, as follows:

I cannot recall the amount of our pack for 1924. I would have to refer to the records. I don't recall whether it was approximately 70,000 dozen. I would have to refer to the records to state intelligently the amount of our pack of pie pears. I do not recall whether there was approximately 500 dozen pie pears in 1924, and I do not have any idea of the number of water pears put up during the season. I do not recall whether it was less than 100 dozen that was packed during the season. As to the visit of Mr. Longwell in August, 1924, I remember Mr. Baxter's visit at the plant, and some gentleman with him, but I do not know the gentleman's name. I secured samples for them. They saw how the pears were being put up. I don't remember whether they took some of the cans, the tops of which had not been put on, and dumped them out in trays and looked at the pieces.

TESTIMONY OF CHARLES ALLEN, FOR DEFENDANT.

The defendant then offered in evidence the testimony of Mr. CHARLES ALLEN, who testified as follows:

My name is Charles Allen. I reside in Seattle. I am engaged in the business of buying canned fruits and canned foods, in which said business I have been engaged twenty years. I am engaged in business in Seattle. I am familiar with the different grades and specifications of canned pears under the specifications of the Northwest Canners' Association and in the trade. Defendant's Exhibit "A–1," setting forth the grades and specifications for the various grades of canned pears [78] correctly states the grades in this district. In September, 1925, I made an examination and inspection of some canned pears in the city of Seattle, Washington, submitted to me by Mr. Ribbeck of the Everett Fruit Products Company, and by him stated to be their substandards of the 1924 pack. Those pears were tolerably free from blemishes, and were tolerably uniform in size. From my knowledge as an expert, and from my inspection and examination of those pears, I will say that they conformed to the grade known as substandard pears. They were substandard pears. I examined three cans there. I only found one slight blemish—just one piece out of the three cans. The nature of that blemish was that the piece had a worm hole cut out of it.

(Testimony of Charles Allen.)

On cross-examination the witness CHARLES ALLEN testified, as follows:

I found one can with one piece of pear in it with a worm hole cut out, apparently. I have no connection with the defendant company, and the only thing I know about these pears being the 1924 pack is what Mr. Ribbeck stated to me. My recollection is that the cans were marked or identified with the letters "H. G. E."

TESTIMONY OF HENRY RIBBECK, FOR DEFENDANT (RECALLED).

HENRY RIBBECK, on behalf of the defendant, then testified as follows:

Mr. MOORE.—"I would like to ask Mr. Ribbeck what letters or identifying marks identified their pack of substandard pears for the season of 1924." [79]

* * * * * * * * *

A. "H. G. E." represents the 1924 pack of substandard or second pears."

Mr. KERR.—"Were any of them marked "H. G. B.?" A. "No, sir."

Thereupon the defendant rested.

REBUTTAL.

The plaintiff then in rebuttal offered in evidence the testimony of the following witnesses:

DEPOSITION OF W. B. LONGWELL, FOR PLAINTIFFS (RECALLED IN REBUTTAL).

The plaintiff then offered in evidence and read the deposition of W. B. LONGWELL, who testified, as follows:

My name is W. B. Longwell. My address, 101 California Street, San Francisco. My present employment—Western Division Sales Director of the California Packing Corporation. With the exception of one year intervening, I have been with that corporation since it was formed in 1906. The corporation is engaged in the manufacture and sale of canned foods, and does now, and for several years past has dealt in canned pears. My particular duties are the directing of sales in the territory west of the Mississippi River, and in directing the sales I naturally have to keep a close check on the various grades and qualities of goods that we are selling from time to time, and I have performed these duties for about twenty years. In a general way, I am and was familiar with the packing conditions in the State of Washington in October and August of 1924. I made trips through Washington territory about the latter part of [80] August, 1924. I am acquainted with the firm of Hoffman & Greenlee, the plaintiffs in this action. I called

(Deposition of W. B. Longwell.)

at defendant's place of business at Everett about August 20, 1924, for the purpose of familiarizing myself with the pack of pears which they were putting up. While there, I went through the plant and looked at some pears that were being canned at that time. Mr. Butler and Mr. Wright were at the plant at that time representing the defendant, and I talked with them. I made a request of Mr. Butler, who was introduced to me as superintendent of the plant, to see some samples of the second pears which he was packing. Mr. Butler obtained some samples of the second pears which he had packed, and submitted them to me. I have a conversation with Mr. Butler, and Mr. Wright, who I believe was one of the managers of the business, was in and out during the conversation. When I went to the plant I believe it was Mr. Butler whom I first saw. I was with Mr. Baxter, and I believe Mr. Baxter introduced me to Mr. Butler. My recollection is that my request for an inspection of the plant and the pack was made to Mr. Butler. It is my impression that Mr. Wright, during the time I was opening cans or inspecting the second pears, only passed by and was not a party to the discussion. After I inspected the pears, I had a conversation on the loading platform with Mr. Wright.

Q. "What was said?"

(The deposition shows the defendant's objection as follows:

Mr. DAVIS.—"We object as immaterial and of

(Deposition of W. B. Longwell.)

no importance in this matter—what was said by the witness or Mr. Wright.") [81]

Mr. MOORE.—"That objection is renewed, if your Honor please."

The COURT.—"I think the objection should be sustained."

Mr. KERR.—"Exception please."

The COURT.—"It will be noted. Let's see. Was that while he was inspecting the samples, or afterwards?"

Mr. KERR.—"That was while he was inspecting them at the plant."

The COURT.—"I think it may go in under the principle of *res gestae*. He may answer the question. Objection overruled."

Exception *save* by the defendant duly noted.

The conversation between Mr. Wright and myself at the place I designated had to do with the quality of pears being packed. I protested to Mr. Wright as to the quality of the pack that they were putting up, and told him that it was not a second pear, but was nothing better than a pie pear. My statement of the quality of the pears to Mr. Wright conformed to what I discovered at that inspection. Substandard is a term that is sometimes applied to second pears, and it is the generally accepted trade theory that they are one and the same thing. When I refer to second pears in any answers, I mean the same as substandard pears. The grade is the same in the trade. In passing through the factory of the defendant company on that day with Mr. But-

(Deposition of W. B. Longwell.)

ler, after cutting the cans in the office, I had quite a discussion with Mr. Butler as to the relative merits, as to what should go into a second and what should not. I cut some cans in the office of the company. The cans were filled with broken pieces of fruit, some of them badly trimmed, and a large part of the contents mushy. I did not make any examination of the syrup that the pears were put up in. We never do and cannot judge of that without resorting to instruments. [82] Mr. Butler was there at that time and selected the cans himself. I asked him for two and a half tin, substandard pear, which I have called seconds. I had a conversation in the presence of Mr. Baxter.

Mr. MOORE.—"We object to that as irrelevant and immaterial."

The COURT.—"A conversation over this sample that he was examining?"

Mr. KERR.—"Yes."

The COURT.—"He may answer."

Mr. MOORE.—"A conversation with Mr. Baxter, who was a representative of the California Packers' Association, the owners of these contracts, by assignment, and not the representative of the defendant."

Mr. KERR.—"Mr. Butler was there, too, Mr. Moore."

Mr. MOORE.—"Save an exception."

The COURT.—"It will be noted."

I discussed with Mr. Butler the question of the grading of fruit that should go into seconds, and

(Deposition of W. B. Longwell.)

Butler stated to me that this was their third day's run and he hoped to be able to improve the quality. From the office I went into the packing plant. There with Mr. Butler and Mr. Baxter we took some cans off of the trays, after they had passed from the canning tables, and we laid out the pieces on the trays so as to see just what percentage of broken and other portions of pears that were in the cans were unfit for seconds.

Q. "Was there any conversation at that time between you and Mr. Butler, in Mr. Baxter's presence, with reference to the quality of the materials that you took out of these tins?"

A. "Just a general discussion as to what should go in and what should not go into seconds." [83]

About October 8th or 9th, I called again at the defendant company's place of business in Everett. I did not inspect any canned pears at that time. I had conversation at that time with Mr. Ribbeck that relates to substandard No. 2½ canned pears. I do not know what position Mr. Ribbeck holds with the defendant company, but he was in the office there. I stated that I was there to inspect pears in the interest of the California Packing Corporation, that had been purchased from Hoffman & Greenlee, providing that they had samples of a lot of second pears to submit to me. Mr. Ribbeck answered that they had the same lot of pears which I had previously looked at. In reply to that I said that I was not interested in that lot of pears as they were

(Deposition of W. B. Longwell.)

not seconds. I think Mr. Wright and Mr. Butler were there at that time.

Q. "Now, then, Mr. Longwell, are you familiar with the market price—"

Mr. MOORE.—"We object to it on the ground it is not proper rebuttal."

The COURT.—"Well, just to conform to principles, the Court will say it is. Evidence is of two kinds, that which tends to prove the plaintiffs' case and that which tends to rebut the other's case, and the same evidence may serve both purposes. You may read it if you desire."

Mr. MOORE.—"Save an exception."

The COURT.—"It is rebuttal pure and simple."

I am familiar with the market price of this grade of pears in the State of Washington and along the Pacific Coast, say between the first of September, 1924, and October 8th, 1924. I am familiar with the price that was carried through on pears until after the turn of the year. [84]

Q. "What was the market price of this grade of pears, at Everett, Washington, on October 8th, 1924, or about that time?"

Mr. MOORE.—"We renew our objection because there has been no testimony from the defense at all as to the market price on October 8th."

The COURT.—"All periods are covered. One of your witnesses covered it from September to the first of the year. Objection overruled."

Mr. MOORE.—"Save an exception."

The going market price for No. 2½ substandard

(Deposition of W. B. Longwell.)

pears sold at Everett, Washington, for fall delivery, in the 1924 pack, on or about October 1, 1924, was $2.85 factory or about $2.90 steamer. After October the price remained about at the $2.85 to $2.90 level. It was about in September in the packing season of 1924 that the price reached $2.85 or $2.90, that is the early part of September, somewhere around the 1st to the 5th of September. My company had purchased this lot of fruit from Hoffman & Greenlee, and that was the reason I was inspecting them.

On redirect examination the witness W. B. LONGWELL, testified, as follows:

I inspected samples of pears on August 20th. I looked at the samples submitted and looked at the stuff as it was being passed on to the trays, and stated that the quality that was being put in the can was not second pears. This inspection at that time was at our own request. Istated at that time that I was there to get a line-up on what they were doing and what the possible out-turn of the pack would be. In that inspection I did not undertake to reject future delivery of the pears. [85]

TESTIMONY OF F. H. BAXTER, FOR PLAINTIFFS.

The plaintiffs offered in evidence the testimony of F. H. BAXTER, who testified as follows:

My name is F. H. Baxter. My occupation vice-president of the Kelly-Clarke Company, Seattle.

(Testimony of F. H. Baxter.)

I am engaged in the merchandise brokerage business. I have dealt in canned pears, and was dealing in canned pears in the summer and fall of 1924. I am familiar with the grades and qualities of canned pears. I recall about August 20, 1924, in company with Mr. Longwell, I visited the plant of the Everett Fruit Products Company at Everett, Washington. I was not there for the purpose of inspecting pears. I merely took Mr. Longwell up for the purpose of inspecting pears. I drove him up in my machine, and went in the plant in company with Mr. Longwell. We met Mr. Butler there. I went out into the packing room where they were packing pears. At that time some pears which Mr. Butler pointed out as being canned as second or substandard pears were examined in my presence.

Q. "What did you find in that examination with reference to the quality of the pears?"

A. "Mr. Longwell said they were not good substandards."

I did not observe this myself to any extent. I was not there for that purpose.

On Cross-examination the witness F. H. BAXTER testified as follows:

Q. "You say Mr. Longwell said they were not good substandards?" A. "Yes." [86]

I have some connection with the California Packer's Company, that is, we are their local agents and have been ever since.

(Testimony of F. H. Baxter.)

On redirect examination the witness F. H. BAXTER testified:

I have sold, as a broker, for the Everett Fruit Products Company.

DEPOSITION OF JOHN L. JACOBS, FOR PLAINTIFFS.

The plaintiff offered and read in evidence the deposition of JOHN L. JACOBS, who testified as follows:

My name is John L. Jacobs, my age is thirty-two years, my business address is California Canneries Company, 600 Minnesota Street, San Francisco, California, my present occupation is manager of the California Canneries Company, and my occupation from August 1, 1924, to the present time has been the same. Eleven years I have been engaged in dealing and manufacturing canned fruit. I have had considerable experience in both buying and selling canned pears and in the examination of the output of two plants for eleven years. In personally examining samples, in the buying and selling of canned pears, and examination of the output of two factories, and manufacturing canned fruits, including pears. Canned pears are sold at varying prices and grades, and there are established grades and qualities known generally on the market on the Pacific Coast, including Everett, Washington, of canned pears. The grades generally known, are, "Fancy," "Choice," "Standard," "Second,"

(Deposition of John L. Jacobs.)

[87] "Water" and "Pie." In Everett, Washington, "Seconds" are called "Substandards." The characteristics and requirements in classifying the grades of pears are covered by the Canners League of California governing California Canneries and the Northwest Canners Association governing packing of pears in the states of Oregon and Washington. These specifications are the same, with the exception that "Second" pears are caddel "Substandard" pears, under the regulations of the Northwest Canners Association. I have listened to the testimony of Mr. Feibush, preceding mine, regarding different characteristics and qualities of these various grades and I concur in the same. Canned "Substandard" pears are packed without size limit, in 10 degree syrup going in, fruit to be tolerably free from blemishes and tolerably uniform in size. As I am the one that gave the order to make the examination, I would state that I was present at the examination of samples, represented to be "Substandard" pears, packed by the Everett Fruit Products Company, submitted by Walter C. Zinn to our company. This examination was held in the office of M. Feibush, at 112 Market Street, San Francisco, and those present were Mr. Robert Frey of the California Canneries Company, Mr. Feibush and myself. These samples were examined on two dates, on September 15th and September 25, 1924.

Interrog. 8.—"State what said examination dis-

(Deposition of John L. Jacobs.)

closed as to the quality, grade and condition of the fruit contained in said samples."

Answer.—"The samples submitted, in our opinion, were not up to the grade of 'Substandard' pears."

Interrog 9.—"State whether or not said samples examined were substandard pears as said term is understood in the trade on the Pacific Coast." [88]

Answer.—"They were not 'Substandard' pears as such term is understood in the trade."

Mr. MOORE.—"We move to strike the answer on the ground it is a mere general statement without stating the basis of fact for any expert opinion."

The COURT.—"The answer will be stricken."

Most of the samples submitted contained a very large percentage of mushy, soft, broken fruit, which is absolutely unfit to be put into grade of "Substandard" and belongs in the "Pie" grade. Also a considerable number of halves in the sample submitted showed holes right through the center of the pears, making those particular halves unfit for the grade of "Substandard" pears and more fit for the grade of "Water" pears. The effect of the presence of such fruit in the sample submitted would render the sample unfit for the grade of "Substandard" pears and unacceptable as such. I have had the general management of sales for the California Canneries Company for five years, in which connection I was in complete touch with market

(Deposition of John L. Jacobs.)

conditions and price fluctuations of canned pears, including No. 2½ cans, "Substandard" pears, throughout the Pacific Coast, including northwest market conditions. It is my recollection that the market value of "Substandard" pears, about the middle of September, 1924, had advanced very considerably, from the market of the prior months of that year, and was somewhere in the neighborhood of $2.85 per dozen, F. A. S. steamer, at the northwest, including Everett, Washington. The market value was thoroughly sustained between the dates of September 12, 1924, and October 18, 1924, and, if anything, was rising slightly. It is my recollection that the market value of No. 2½ "Substandard" pears, in the northwest, including [89] Everett, Washington, F. A. S. steamer, between September 12, 1924, and October 18, 1924, was between $2.85 and $2.90 per dozen.

The plaintiffs then offered in evidence the deposition of Robert D. Frey, whereupon the defendant objected, as follows:

Mr. MOORE.—"May it please your Honor, we wish the record to show that our same objection runs to all of this testimony on the ground that it is not proper rebuttal."

The COURT.—"It may be entered. Objection overruled."

Mr. MOORE.—"Save an exception."

DEPOSITION OF ROBERT D. FREY, FOR PLAINTIFFS.

Thereupon the plaintiff offered and read in evidence the deposition of ROBERT D. FREY, who testified as follows:

My name is Robert D. Frey, my age thirty-two, the address of my business 600 Minnesota Street, California Canneries Company, my present occupation domestic sales manager of the California Canneries Company, and my occupation from August 1, 1924, to the present time has been the same. I have been engaged in dealing and manufacturing canned fruits about thirteen years, as salesman for the California Canneries Company, eastern manager and domestic sales manager, I have been engaged, at least for the last eleven years, in buying and selling pears and keeping myself posted on the market, and my experience in buying pears has qualified me in determining grades. I was called upon to cut samples and examine them on the basis of the price, both in buying and selling pears, and determine whether or not they were up to grade. Canned pears are sold at varying [90] . prices and grades. There are established trade designations and names for difference grades and qualities of canned pears. The grades set by the Canners League of California are "Fancy," "Choice," "Standard," "Seconds," "Water" and "Pie." The grades set by the Northwest Canners Association in which district Everett, Washington, is lo-

(Deposition of Robert D. Frey.)

cated, are the same, with the exception that "Second" pears are designated as "Sub-standard" under their specification. The qualifications, requirements and characteristics of these grades, in both associations, are identical. The grade known as "Seconds" in California being designated as "Sub-standard" by the Northwestern Canners Association. I have heard Mr. Feibush's testimony and concur with his specifications as to the requirements of each particular grade. The following are the quality and characteristics of canned "sub-standard pears": no size limits, put in syrup 10 degrees, fruit to be tolerably free from blemishes, tolerably uniform in size.

At the request of the officers of California Canneries I made an examination of samples of No. 2½ cans substandard pears offered by W. C. Zinn to the California Canneries. The examination was made at the office of Mr. M. Feibush, and there were present besides Mr. Feibush, a Mr. John Jacobs and myself. I personally made a note of the examination made on September 15, 1924, of four cas, at the time of said examination. One can cut was evidently not packed as "Sub-standard" at all, but contained a syrup that was at least two grades higher and evidently a mistake. The balance were not suitable for the grade, with the exception of one can, which was, I should say, just about passable. I would like to offer, for identification, as part of my deposition, this statement which I made at [91] *at* the time of my examination, and have it marked

(Deposition of Robert D. Frey.)

for identification as Plaintiff's Exhibit "F." (Plaintiff's Exhibit "F" attached to said deposition is in words and figures as follows, to wit:

PLAINTIFF'S EXHIBIT "F."

SAMPLE RECORD.

SIZE TIN—#2½. DATED EXAMINED—9/15/24. FRUIT—Pears. VARIETY— ——. GRADE—Second. SUBMITTED BY—E. PACKER—Everett F. P. Co. PACKED—Everett. LABEL—Pilchuck. PLANT —— MARK—H. G. E. NUMBER CASES ———.

	Total Number Pieces.	Net Weight.	Number Pieces Lost.	Number Pieces Good.	Syrup.	General Appearance.
1	10				23°	Suitable for stds—Lot unfit for salad.
2	15				12°	2 Bkn. O. K. for seconds.
3	About half can Bkn. pcs.				12°	N. G. for anything.
4	Same.				12°	" " " "
5						
6						

GENERAL REMARKS—Lot doubtful.

Taken as a whole, the samples examined were not "Sub-standard" pears, as said term is understood in the trade on the Pacific Coast. The cans contained too many broken pieces, in fact, two of the cans were nothing but broken pieces, and were discolored, rather brownish, and many of the pieces had holes [92] that had been cut into the pear, either to core out worms or various bad blemishes. The fruit was also very soft and mushy, and we would not pass this lot as "Sub-standard." My ex-

(Deposition of Robert D. Frey.)

perience has been as sales manager and eastern manager, and that has been part of my job, to keep myself posted on market conditions and prices, particularly as affecting the price of No. 2½ cans "Sub-standard" pears, for the last eleven years, and, particularly, during 1924 and throughout the Pacific Coast. My recollection is that the market price for "Sub-standard" pears, on or about September 12, 1924, was in the neighborhood of $2.80 to $2.85 F. A. S. steamer, Everett, Washington. Between September 12, 1924, and October 18, 1924, the market had advanced, probably 5 to 10 cents a dozen, by October 18, 1924. The highest and lowest market value of the said pears between the said dates was $2.80 and $2.95.

Mr. KERR.—"I will now read the deposition of Mr. Weston, which was taken at Seattle."

Mr. MOORE.—"May it please your Honor, I believe this refers to the London shipment and some matter of compromise, a controversy based on some examination and inspection in London or Liverpool, and we renew our objection to this deposition."

The COURT.—"Compromise with another party, of course, would be no objection to the use of it as evidence. The jury will determine how much weight, if any, it will be entitled to. The question I had in mind all along has been whether or not there is anything known to the trade or to experts that would cause the quality of the pears to deteriorate between here and London."

Mr. MOORE.—"We can show and will show that."

(Deposition of Robert D. Frey.)

The COURT.—"Then you will have a chance on surrebuttal. You may proceed. Objection overruled."

Mr. MOORE.—"Save an exception." [93]

DEPOSITION OF R. G. WESTON, FOR PLAINTIFFS.

The plaintiffs then offered and read in evidence the deposition of R. G. WESTON, who testified on direct examination, as follows:

My name is Richard George Weston. My business address is Powell Brothers & Co., 15 Philpot Lane, E. C., London. I am engaged in the business of canned goods generally, and have been engaged in that business a little less than fifty years. Our firm was established about fifty-five years ago, and I have been with them about forty years. For just that period I have been dealing in canned goods, purchasing them, in the United States of America. The last few years I have made purchases of canned pears on the Pacific Coast of the United States from canners. To be precise, we are agents for different packing companies—that is, in the British Isles we represent American manufacturers and dealers in canned fruits. I am familiar with the different grades of canned fruits, and particularly canned pears, as they are sold on the Pacific Coast of the United States of America. Powell Brothers & Co. in the fall of 1924 made a purchase of 5,000 cases second standards—2½ second standards, pears, from

(Deposition of R. G. Weston.)

Dodwell & Company, who acted through Meinrath, Corbaley & Co. from the Everett Fruit Products Company. Under that contract deliveries of canned pears were made at London. I do not recall the approximate date of their receipt. I examined some of the contents of that shipment for quality. We opened a number of tins, sufficient to prove the quality. The size of the fruit varied enormously, the pears in one tin ranging from the size of a half dollar piece to the customary size of pear used, which would be expected to be tendered—that is customary. In several tins [94] we found one or more pears which were so soft that they were in a state of mush. Furthermore, in a large number of pears pieces had been cut out of them to remove a damaged portion, and even some pears had a hole drilled right through them to remove such damaged portion. The Liverpool shipment of 500 cases bore the can mark on the tins of "HGB" and on the London shipments of 1,000 cases and 296 cases, the can mark was "HGE." The total shipment was 1,796 cases. Fifteen hundred cases were shipped by the S.S. "Urania" from the Pacific Coast, of which 500 cases were landed in Liverpool and the remaining 1,000 cases were transshipped from—

"I will finish my answer please—"

of which 1,500 cases were shipped from the Pacific Coast by S.S. "Urania," of which 1,000 cases were landed in London and 500 cases were transshipped from London by the S.S. "Southern Coast," to Liverpool. The remaining 296 cases were shipped

(Deposition of R. G. Weston.)

from the Pacific Coast by S.S. "London Shipper." The examination that I made of the samples drawn at London was in my usual course of business there.

On cross-examination the witness R. G. WESTON testified, as follows:

I made an examination of these samples in our sample room in London, in our London office. Of the Liverpool shipment I examined personally about twelve tins. Of the London shipment I examined about twelve tins of each, two shipments. The examination was made in the sample room, respectively in our London office and in our Liverpool office, and that was the first time that I had seen the samples, when I [95] saw them in our sample room.

Thereupon the plaintiffs rested.

SURREBUTTAL.

TESTIMONY OF F. B. WRIGHT, FOR DEFENDANT (RECALLED IN SURREBUTTAL).

In surrebuttal the defendant then offered in evidence the testimony of F. B. WRIGHT, who, on direct examination, testified, as follows:

Mr. MOORE.—"Mr. Wright, as a man familiar with canned fruits and canned pears, in the canning and delivering of those pears, do you know what would be the effect or probable effect of a long shipment, say, by a steamship, from Everett to Liverpool, England, on the contents of the cans?"

(Testimony of F. B. Wright.)

A. "I could not tell the exact percentage; it varies; it is handled rougher in some ships than it is in others."

Q. "Then, the handling would tend to have some effect?" A. "Yes, it does."

Q. "What effect?"

A. "Deterioration in appearance."

Q. "Would it have any other effect, or will you describe just what the effect is?"

A. "A pear is a delicate piece of fruit, and the rougher a case or package is handled, the more opportunity there is for breaking down the pieces of pears. Pears are canned in halves in all grades except seconds. Anything goes in the seconds, but there will be more or less deterioration in shipping by water, or in shipping by mail or shipping by express."

I do not know where these cans of pears were stowed in the vessels on which they were sent to stowed n the vessels on which they were sent to Powell & Company. It would make a big difference on the final condition [96] of the pears on arrival as to what temperature they had been kept at. If kept under a warm or hot temperature, pears would deteriorate a great deal quicker than they would under ordinary temperature. These steamer shipments of pears are generally stowed in the holds of the vessel. The samples that were sent to Zinn & Company were sent by parcel post.

Q. "Can you state what the probable effect on

(Testimony of F. B. Wright.)

pears is in shipment by parcel post from Seattle to San Francisco?"

A. "Sometimes it has a very disastrous effect, because they get rough treatment being handled by the Post Office department, and helps to break up the pieces worse than they were to start with."

On cross-examination the witness F. B. WRIGHT testified, as follows:

Shipment either by parcel post or by boat does not make worm-holes or holes clear through the pieces. That class of fruit is permissible in second pears. My interpretation of seconds is that everything that is not standard goes into seconds. That is why it is seconds, because it is not suitable to put in standard or choice or a better grade.

Q. "Look at this Defendant's Exhibit 'A–1' and at the designation of substandard and also the designation of pie.

A. "Substandards, no size limit. Now, it says the fruit to be tolerably free from blemish, and tolerably uniform in size."

Q. "Now, read what the qualification for pie is in there."

A. "Wholesome fruit unsuitable for other grades. * * * Everything that is not suitable for standards; that is, of any firmness, can go into seconds. We have always packed them as such.

Q. "So that all fruit that you packed at your plant during 1924 which was not suitable for standards, you put into the substandards?" [97]

(Testimony of F. B. Wright.)

A. "Not all fruit, no. There is a pie grade un-
(Testimony of F. B. Wright.)
der that. A soft, mushy pear goes to pie."

I do not know the quantity of seconds and pie packed by our company last year. I could not tell you without referring to the records the total pack of our company for standard pears in 1924. It was more than approximately 80,000 dozen. I could not say how much more than that without referring to the records. Our pack of water pears was a great deal more than 100 dozen. It was probably 2,000 cases. Our pack of seconds for the season was something in the neighborhood of forty or fifty per cent of our contracts for the sale of seconds. My recollection is that we had packed about forty or fifty per cent to deliver on orders of one hundred per cent.

On redirect examination the witness F. B. WRIGHT testified, as follows:

There was a short crop that year, and there was a short pack that year.

Mr. MOORE.—"We rest. At this time the defendant desires to move the Court for a directed verdict for the defendant in this case. I will state our grounds very briefly."

The COURT.—"Proceed."

Mr. MOORE.—"May it please the Court, there are three grounds upon which I would urge this motion. One of them is an alternative ground. First of all, the testimony adduced by the plain-

(Testimony of F. B. Wright.)

tiffs' own witnesses shows that the contract in question was assigned to the California Packers' Corporation, or the California Canners' Association, whatever the name of that company was, and that that company was and is the owner of the contract, and such being the case the plaintiff in this case is now the real party in interest and has no right to maintain this action.

"In the alternative, if your Honor should take the view that instead of being an absolute [98] assignment of the contract, that this was merely a resale or subsale by the plaintiff, then we have this situation: That if the plaintiffs should be entitled to recover at all, the measure of their damages would be the difference between the contract price and the subsale price, and would be limited to that, and yet there is no evidence here before your Honor to show that there was any advance or any difference whatsoever,—no evidence to show they suffered any damage whatsoever.

"Again, on the question of the contract itself, your Honor will notice that those two contracts provide for a sale of substandard pears, subject to approval of sample. There was no present consideration paid for that contract; that agreement was a unilateral agreement and amounted to nothing more than an option on the part of the buyer. The buyer had the privilege of rejecting the pears, samples of which were submitted to him, even though they would come within the substandard grade. They might not suit his particular taste or his par-

(Testimony of F. B. Wright.)

ticular trade. He could reject those and the Everett Fruit Products Company would have no right of action against him for rejecting. There was no obligation or promise or agreement on the part of Hoffman & Greenlee to accept the samples submitted to them, and there being no obligation of that sort, no consideration was paid for the contract. The contract was unilateral and nothing more than an option, and at any time prior to the exercise of that option could have been rescinded by either party. We respectfully submit to your Honor that upon those grounds or upon any one of those grounds that there should be a directed verdict for the defendant in this case."

(Argument by Mr. Moore.)

Mr. KERR.—"Since counsel for defendant has moved for a directed verdict, I at this time join in the motion for a directed verdict and ask your Honor to decide the case and not submit to the jury any question except the question of damage."

(Argument by Mr. Kerr.)

The COURT.—"The contract in this case is a contract for the purchase of a certain amount of canned pears of a well-known and standard grade in the trade, called substandards or seconds. Taking the contract as a whole, it is very apparent that both parties intended it in good faith and by them each to be performed in good faith. The defendant was to furnish pears of the grade for which he had contracted, and the plaintiff to [99] take those pears providing they were of that grade and

(Testimony of F. B. Wright.)

approved even as it might be to his sense of taste.

"In respect to the sample. The contract contained the term 'subject to approval of sample.' A party who contracts in that fashion leaves the question of approval entirely to the other party. He is not obliged to do it. The evidence in this case is that they did, however, for the defendant shipped those samples down to San Francisco to Zinn & Company, and by Zinn & Company they are submitted to the plaintiff. You leave the question of approval, then, of the material to be furnished in the contract entirely to the buyer, as was done in this case. Of course there was a reason why the plaintiff would want samples before it accepted the goods. The goods were to be packed in Washington, and the plaintiffs' home office, at least so far as it appears, its only place of business was in San Francisco, and it desired to inspect the fruit, at least that far, before it would consent to receive it, and hence this stipulation as to approval of the sample. The law in reference to 'hat is this: It is a binding contract, and the parties leave it to the buyer to say whether he will approve the sample, but he is obliged to act in good faith and have motives of honesty and justice to the other party. He still has a right to say there is that in the fruit that does not meet his approval, and that rejects it, and he would still be entitled, as the Court views it in this case, to recover his damages. It is not a question of whether the pack would be sufficient to satisfy the contract, because the buyer

(Testimony of F. B. Wright.)

in this case stipulated that he should be satisfied with the sample. In other words, if the sample did not please him, and if he acted in good faith, not from any dishonest purpose, and found the goods did not come up to the standard, his judgment is final and conclusive, and could only be impeached if there was evidence in the case to warrant the jury to find that the buyer, namely the plaintiff in this case, was acting in bad faith and should have been satisfied where he said he was not satisfied.

"For these reasons the Court will grant the motion of the plaintiffs for a directed verdict, and will deny a like motion for the defendant. That is to say, the plaintiff is entitled to recover. How much he is entitled to recover will be left for the jury to determine."

Mr. MOORE.—"Save an exception, your Honor." [100]

The COURT.—"An exception will be noted. Proceed with the argument."

(Argument to jury by respective counsel.)

INSTRUCTIONS REQUESTED BY DEFENDANT.

The defendant presented to the Court certain instructions in writing, as follows, and requested the Court to give each and all of said instructions, being instructions Nos. 1 to 9, inclusive.

(The following notation signed by the trial Judge appears endorsed on the face of said written, requested instructions, to wit:

"Laid on the bench, after the Court determined the parties motions each for a directed verdict.

BOURQUIN, J.")

The said requested instructions are, as follows:

DEFENDANT'S REQUESTED INSTRUCTION No. 1.

You are instructed if you find from the evidence that the pears purchased from the defendant by the plaintiffs were purchased for the purpose of resale and that the defendant knew that said pears were purchased for the purpose of resale and that said pears were resold by said plaintiffs to the California Packing Company, then you are instructed that the measure of damages in this case is the difference between the contract price and the price of such resale, and there being no evidence in this case of the resale price, you shall find for the defendant. [101]

DEFENDANT'S REQUESTED INSTRUCTION No. 2.

You are instructed that under the contract made between the plaintiffs and the defendant for the sale of pears the plaintiffs agreed to purchase from the defendant substandard pears of defendant's 1924 pack "subject to the approval of plaintiffs." and if you find from the evidence in this case that said defendant submitted to the plaintiffs fair samples of its 1924 pack of substandard pears as packed by said defendant and that said plaintiffs failed and refused to approve said samples, then

there was no sale and you shall find for the defendant.

In the event that the Court refuses to give the foregoing instruction the defendant requests the Court to give the defendant's requested Instruction No. 3.

DEFENDANT'S REQUESTED INSTRUCTION No. 3.

You are instructed that under the contract between the said plaintiffs and defendant for the sale of pears as alleged in the complaint herein it is provided that such sale is "subject to approval of sample" and if you find from the evidence in this case that the defendant submitted to the plaintiffs sample cans of pears and that such samples submitted were of the grade known as "substandard pears" and that the plaintiffs failed and refused to approve such samples so submitted, then there was no sale and you shall find for the defendant.

DEFENDANT'S REQUESTED INSTRUCTION No. 4.

You are instructed that under the contract between the plaintiffs and the defendant the plaintiffs purchased [102] from the defendant pears "subject to approval of sample" and it was the duty of defendant under such contract to submit to the plaintiffs samples of substandard pears of its 1924 pack and the obligation was upon the plaintiffs to approve or reject such samples, and if you find in this case from the evidence that such contracts as set forth in the complaint herein were assigned to

the California Packing Company or that the pears covered by said contract were resold to the California Packing Company and that the plaintiffs delegated to a representative of the California Packing Company the duty to inspect said pears and to reject or approve such pears, then you shall find for the defendant for the reason that said plaintiffs under said contract had no right to delegate the authority to any other person or persons.

DEFENDANT'S REQUESTED INSTRUCTION No. 5.

You are instructed that if you find from the evidence that the defendant submitted to the plaintiffs samples of canned pears which samples could be properly graded according to the grades known and established among the trade in the Pacific northwest as substandard pears, and that said plaintiffs rejected or refused to approve such samples, then you shall find for the defendant and it makes no difference for the purposes of this instruction whether such substandard pears were good, bad or indifferent so long as they were substandard pears.

DEFENDANT'S REQUESTED INSTRUCTION No. 6.

You are instructed, if you find from the evidence that the plaintiff had made a subsale to the California [103] Packers' Corporation, or any other person, of the pears described in the contracts in this case between the plaintiff and the defendant, and if you further find that the defendant failed to furnish to the plaintiff samples of substandard

pears described in said contracts, and if you further find that the plaintiff is entitled to recover damages from the defendant for such failure, then in ascertaining such damages, you are hereby instructed that if you find that such subsale was made, as hereinabove mentioned, then the plaintiff would not be entitled to recover any more than nominal damages.

DEFENDANT'S REQUESTED INSTRUCTION No. 7.

You are instructed that if you find from the evidence that the contracts between the plaintiff and the defendant have been assigned to the California Packers Corporation or to any person other than the plaintiff, then you shall find for the defendant.

DEFENDANT'S REQUESTED INSTRUCTION No. 8.

You are requested to find for the defendant.

COURT'S INSTRUCTIONS.

Thereupon the Court gave the following instructions to the jury:

Gentlemen of the Jury: It is now for the Court to give you the instructions that are applicable in the case. The facts you will find, as always, for yourselves.

In this case there is only the question of [104] the amount of the damages which is left to you. The question of who is entitled to recover on the findings and the evidence in this case was a question, as it turns out, for the Court to decide, and

the Court decided on these contracts and in view of all the evidence, the plaintiffs are entitled to recover. It is left to you to say how much. At the very least plaintiffs would be entitled to nominal damages, which is one dollar. If, in your honest judgment, the plaintiffs have suffered substantial damages, it will be your duty to allow them whatever amount your judgment is.

The contracts called for five thousand cases of two dozen cans each, of the variety of pears known as substandards. Samples were to be delivered, were delivered and they were rejected and disapproved by the plaintiffs in the case. The samples which were expressly sent by the defendant to the plaintiffs in San Francisco, apparently were received and examined along about September 12, 1924, and disapproved, and at that time the plaintiffs had the defendant's Agent, Mr. Zinn, send a telegram stating that the samples were not satisfactory.

According to the contracts, as I understand them, no definite date of delivery is fixed in them. Consequently, the date of delivery would be any time that in your judgment would be a reasonable time after September 12, 1924, and, consequently, the damages to which plaintiffs would be entitled would be such as might be the difference in the price that it was to pay to the defendant and the market value of the goods in the same market during that interval of time. That is the rule of damages, the difference between what the buyer was to pay for the goods and what he could restore himself by going

[105] into the open market and buying the goods, what price he would have to pay. If the plaintiffs were to pay $2.50 a dozen for these goods, and if they could in the open market buy the same goods for $2.50, of course they would not be damaged anything beyond mere nominal damages, which is one dollar, by reason of the breach of the contracts.

On the other hand, if it was necessary for the plaintiffs to pay in the open market $2.65, $2.85, or $2.90 a dozen, the plaintiffs would be damaged the difference between $2.50 and the $2.85 or $2.90 they would have to pay on the open market.

Now, what was the market value, of course, is an issue for you to decide. For when you once determine what the market value is, you simply deduct from that the price that the plaintiffs were to pay, which will give you the amount of damage on each dozen. Mr. Hoffman, a member of the partnership, testified that at that time, September 12th to October 18, 1924, the price of like goods on the Pacific Coast—these goods are shipped by freight, and perhaps the price in one place would not be very much different from another—was $2.85 or $2.90 a dozen, which would be thirty-five or forty cents above the price that Hoffman & Greenlee were to pay to the defendant for the goods. Pratt, who was with the California Packing Company, if I remember rightly,—what their relations were with the plaintiffs, if any,—I do not know that they had any,—you will take the testimony, Gentlemen of the Jury,—but Mr. Pratt testified these goods, substandards, at the time, about Sep-

tember 12, 1924, when these samples were examined by Hoffman & Greenlee and rejected, were $2.90 a case. Now, that is all the testimony in chief on the part of the [106] plaintiffs in reference to market value.

The defendant presented in its behalf, the testimony of Mr. Ribbeck, a member of the company, who testified that in September, 1924, the price was about $2.50 a dozen. How much more he does not say. From the standpoint that he is an interested party, you can draw the conclusion—though you are not bound to—that he did not mean anything less than $2.50. In other words, in the case of all interested witnesses you may consider whether they are not apt to draw the testimony just as favorably to themselves as they can, and, of course, as they deem it consistent with their oath. That would apply also to Mr. Hoffman and his testimony of $2.85 of $2.90 a dozen. Mr. Wright, also associated with the defendant, testified that the price during that time, September and October, and even to the first of 1925, was $2.50, and the highest was $2.65 a dozen cans. That at the very least is $2.65, which would be fifteen cents more than the plaintiffs were required to pay the defendant for the goods.

In rebuttal the plaintiffs made use of the testimony of Mr. Longwell, who was one of their agents, if I remember rightly, and he testified that at that time, October 1st, the goods were worth $2.85 at the factory, a dozen, and $2.90 alongside steamer. The goods in this case were contracted to be delivered free alongside steamer, $2.90 along steamer.

Now, this evidence in rebuttal, the distinction between its value and that in chief is very hard for the average man to appreciate. But the evidence of Mr. Longwell simply goes, not to sustain the fact that the goods were actually worth so much money, but simply as an offset, so far as you may think it does impeach—as we use that term—the evidence on behalf [107] of the defendant that the goods were only worth $2.65 or $2.50.

Gentlemen of the Jury, that is the whole case. There is no law to be dwelt upon by the Court. All you are required to do is to determine the market price of those goods at and after the time when the defendant should have delivered them to the plaintiffs. When you have found that market price, if it is more than $2.50, substract $2.50 from it, and then it is so many cents a dozen, and the plaintiffs are entitled to that amount on ten thousand dozen case of pears. You will write that amount in your verdict.

Twelve of your number must agree upon a verdict in this case.

I may say to you, of course, this is different than a criminal action. In a criminal case the proof in behalf of the plaintiff must be beyond reasonable doubt. In this case the plaintiffs must prove their case, the amount of their damages, by simply the greater weight of the evidence, that evidence which outweighs the evidence of the other party. The credibility of the witnesses is for you, how much weight you will give to their testimony. That is, on

the credibility of the witnesses you are to ascertain the market value of those goods at the vital time.

Mr. MOORE.—We have certain exceptions, if your Honor please, that we would like to take to your Honor's instructions.

The COURT.—Proceed.

Mr. MOORE.—The defendant excepts to the refusal of the Court to give its requested Instruction No. 1.

The defendant excepts to the refusal of the Court to give its requested Instruction No. 2. [108]

The defendant excepts to the refusal of the Court to give its requested Instruction No. 3.

The defendant excepts to the refusal of the Court to give its requested Instruction No. 4.

The defendant excepts to the refusal of the Court to give its requested Instruction No. 5.

The defendant excepts to the refusal of the Court to give its requested instruction—I will ask the Clerk to mark it No. 6, being the next one following after No. 5. I will read the requested instruction, your Honor, in order to get it into the record.

The defendant excepts to the refusal of the Court to give its following requested instruction: (Reads).

The defendant excepts to the refusal of the Court to give the following requested instruction:

"You are instructed if you find from the evidence that the contracts between plaintiff and defendant—"

The COURT.—Just a minute. Haven't you got these numbered? We do not want you to read all these instructions to the jury, as we do not have the

time for it, and when the jury get out they will forget which instructions you read and what the Court gave.

Mr. MOORE.—If the Clerk will mark it No. 7, then we will except to the refusal of the Court to give defendant's requested Instruction No. 7.

The COURT.—Yes. I know that happens, that when the jury retires they do not know what the lawyers have said and what the Court has said.

Mr. MOORE.—We ask the Court to identify the next instruction as Instruction No. 8. [109]

The COURT.—Give it any number; any arbitrary number will do. You do not have to have them in order.

Mr. MOORE.—We except to the Court's refusal to give each and every instruction requested by the defendant, and which was refused by the Court, including Nos. 6, 7 and 8, as well as the other numbers mentioned.

The COURT.—Very well.

Mr. MOORE.—The defendant also excepts to the instruction of the Court to the effect that the only question is a question of damage.

It excepts to the instructions of the Court wherein the Court stated there was no date fixed for the delivery of the goods.

The defendant excepts to the instruction of the Court where the Court instructed in substance and effect that the measure of damages was the difference between the contract price and the market price.

The defendant further excepts to the instruction of the Court to the effect that the time for determining the market price could be taken at any time within the limits stated by the Court, subsequent to September 12, 1924.

The defendant excepts to the instruction of the Court to the effect that there is no difference, or no substantial difference in the market price of the goods at different points or localities.

The defendant excepts to the instruction of the Court in commenting on the testimony of Mr. Ribbeck to the effect that his testimony that the market price was about $2.50 meant that it was $2.50 or more than [110] that.

The defendant also excepts to the instruction of the Court relative to Mr. Ribbeck being an interested witness. Those are the exceptions.

The COURT.—Let the record show the instructions which the Court, as counsel states, did not give, and to which he excepts, were presented to the Court, laid upon the bench, after the Court had ruled upon the motions in respect to the verdict.

The Court will give you the pleadings, Gentlemen of the Jury, to refresh your recollection, and the contracts in reference to the number of cases, and a single form of verdict, in which you will fill in the amount.

Mr. MOORE.—May it please your Honor, may I have the record show that the requested instructions were first laid on the desk of the Clerk before they were put on your Honor's desk.

The COURT.—You may, if that is the fact, and if counsel agrees to it.

Mr. MOORE.—I will ask counsel—

Mr. KERR.—I do not know, but I do know that Mr. Moore did request a directed verdict, which I assume waives those matters.

The COURT.—Well, let the record stand as it is.

(Thereupon jury retired to consider its verdict.)" [111]

And, now, in furtherance of justice and that right may be done, the defendant tenders and presents the foregoing as its bill of exceptions in the above-entitled cause, and prays that the same may be settled and allowed and signed and certified by the Judge who tried said cause, as provided by law.

WILLIAM & DAVIS,
REAMES & MOORE,
Attorneys for Defendant.

Copy of the attached bill of exceptions received and due service thereof admitted this 22d day of March, 1926.

KEER, McCORD & IVEY,
N. S.
Attorneys for Plaintiffs. [112]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

On this —— day of ——, 1926, the above-entitled matter came on to be heard on application of the defendant, Everett Fruit Products Co., to settle

the bill of exceptions in said cause; the defendant appearing by its attorneys, Williams & Davis and Reames & Moore, and the plaintiffs appearing by their attorneys, Kerr, McCord & Ivey; and it appearing to the Court that the bill of exceptions was duly served on the attorneys for the plaintiffs and lodged with the Clerk of this Court, and presented to the Court within the time provided by law as duly extended by the order of the Court herein, and that amendments thereto have been accepted and incorporated therein, and all the parties consenting to the signing and settling of the same; and it appearing that the time for settling said bill of exceptions has not expired; and it further appearing to the Court that the defendant's bill of exceptions contains all the evidence introduced or offered in the trial of said cause and all the material matters and things [113] occurring upon said trial relating to the foregoing exceptions;

NOW, THEREFORE, I, GEORGE M. BOURQUIN, United States District Judge, who presided at the trial of the above-entitled cause, do hereby certify that the defendant's bill of exceptions is a full, true and correct bill of exceptions in the above-entitled cause; that the foregoing recitals with reference thereto are true and correct, and the same is now by me hereby settled and allowed and approved as a true and correct bill of exceptions in said cause.

Done in open court this 30 day of March, 1926.

BOURQUIN,
Judge.

[Endorsed]: Lodged Mar. 22, 1926.

[Endorsed]: Filed Mar. 30, 1926. [114]

[Title of Court and Cause.]

TIME EXTENDED FOR SUING OUT WRIT OF ERROR.

Now on this 4th day of May, 1926, an order is entered extending term for suing out of writ of error and all other proceedings relating to said cause.

Journal No. 14 at page 397.

[Title of Court and Cause.]

ENTERED ORDER (EXTENDING TERM).

Now on this 2d day of November, 1926, an order is entered on motion of Ben L. Moore, extending term for disposition of motion for a new trial and for suing out writ of error.

Journal No. 14 at page 674. [115]

[Title of Court and Cause.]

ORDER ENLARGING TIME TO FEBRUARY 5, 1927, FOR FILING RECORD.

Upon application of the plaintiff in error, and for good cause shown,

IT IS HEREBY ORDERED: That the time within which the citation in error herein shall be made returnable and the time within which the plaintiff in error shall file the record and docket the case with the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and hereby is enlarged, and is fixed as the 5th day of February, 1927.

Done in open court this 10th day of November, 1926.

JEREMIAH NETERER,

Judge United States District Court for the Western District of Washington, Northern Division.

[Endorsed]: Filed Nov. 10, 1926. [116]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of record in the above-entitled cause for presentation to the Circuit Court of Appeals for the Ninth Circuit upon the writ of error of the defendant, Everett

Fruit Products Company, a corporation, and in the preparation of said transcript, you will please prepare and certify a copy of the following papers filed and proceedings had, to wit:

1. The complaint.
2. The process and return.
3. The answer of defendant and reply of plaintiffs.
4. Impaneling jury.
5. Verdict.
6. The judgment.
7. Order extending time for presenting and settling bill of exceptions.
8. Bill of exceptions.
9. Motion for a new trial. [117]
10. Order or record memorandum thereof made on May 4, 1926, extending the term.
11. Order for record memorandum thereof made on November 2, 1926, extending the term.
12. Order overruling the motion for a new trial, and record of entry thereof.
13. Petition for writ of error.
14. Assignment of errors.
15. Order allowing writ of error.
16. Writ of error.
17. Citation in error.
18. Bond and approval.
19. Clerk's certificate.
20. This praecipe.
21. Order enlarging time for filing record.

Dated at Seattle, Washington, this 10th day of November, 1926.

WILLIAMS & DAVIS,
REAMES & MOORE,

Attorneys for Defendant, Everett Fruit Products Company, a Corporation.

Service of the within and foregoing praecipe for transcript and receipt of a true and correct copy thereof is hereby admitted this 10 day of November, 1926.

KERR, McCORD & IVEY,

Attorneys for Plaintiffs, Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, Copartners Doing Business Under the Firm Name and Style of "Hoffman & Greenlee."

[Endorsed]: Filed Nov. 10, 1926. [118]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 118, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel

filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [119]

Clerk's fees (Act of February 11, 1925) for making record, certificate or return 329 folios at 15¢	$49.35
Certificate of Clerk to transcript of record, with seal	.50
Total	$49.85

I hereby certify that the above cost for preparing and certifying record, amounting to $49.85 has been paid to me by attorneys for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and citation on writ of error issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 24th day of November, 1926.

[Seal] ED. M. LAKIN,

Clerk, United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [120]

[Title of Court and Cause.]

WRIT OF ERROR.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States of America, to the Honorable Judge of the United States District Court for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, in that cause wherein Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, copartners doing business under the firm name and style of "Hoffman & Greenlee," are plaintiffs and Everett Fruit Products Co., a corporation, is defendant, a manifest error has happened to the damage of the said Everett Fruit Products Co., a corporation, plaintiff in error, as by said complaint appears, and we, being willing that error, if any hath been, should be corrected and full and speedy justice be done to the party aforesaid in this behalf, do command you if judgment be therein given that under your seal distinctly

and openly you [121] send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the courtroom of said court, in the Postoffice Building at San Francisco, California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this, the 10th day of November, A. D. 1926.

[Seal] ED. M. LAKIN,

Clerk of the United States District Court for the Western District of Washington.

By S. E. Leitch,
Deputy.

Allowed this 10 day of November, A. D. 1926.

JEREMIAH NETERER,
United States Judge. [122]

Copy received and service acknowledged Nov. 10, 1926.

KERR, McCORD & IVEY,
Attys. for Defendants in Error.

Filed Nov. 10, 1926. [123]

[Title of Court and Cause.]

CITATION IN ERROR.

The United States of America,
Ninth Judicial Circuit,—ss.

To Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, Copartners Doing Business Under the Firm Name and Style of "Hoffman & Greenlee," GREETING:

YOU ARE HEREBY CITED and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, State of California, on the 5 day of February, 1927, next, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Everett Fruit Products Co., a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, [124] should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, United States District Judge for the West-

ern District of Washington, this, the 10 day of November, 1926.

JEREMIAH NETERER,
Judge of the United States District Court for the Western District of Washington.

[Seal] Attest: ED. M. LAKIN,
Clerk of the United States District Court for the Western District of Washington.

By S. E. Leitch,
Deputy. [125]

Service of the within and foregoing citation in error and receipt of a true and correct copy thereof is hereby admitted this 10 day of November, 1926.

KERR, McCORD & IVEY,
Attorneys for Defendants in Error.

Filed Nov. 10, 1926. [126]

[Endorsed]: No. 5020. United States Circuit Court of Appeals for the Ninth Circuit. Everett Fruit Products Co., a Corporation, Plaintiff in Error, vs. Oscar Hoffman, Elwood C. Boobar and Fred S. Greenlee, Copartners Doing Business Under the Firm Name and Style of Hoffman & Greenlee, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed December 6, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.